

INDEX

	Page
Docket Entries	1
Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, Declaratory Judgment and Damages	5
Plaintiff's Exhibit A	19
Motion for Preliminary Injunction	22
Motion for Temporary Restraining Order	24
Affidavit of Adolph J. Levy	26
Motion and Order to Amend Complaint	28
Answer on Behalf of Louis Reichert, George Bethea and Earl Wendling	34
Order Substituting Judge Boyle	40
Designation of Judges Boyle, Sr., Rubin and Wisdom to Constitute 3-Judge Court	41
Plaintiffs' Amended Motion for Preliminary Injunction	43
Minute Entry, March 27, 1969	45
Plaintiff's Motion to Amend Complaint	45
Minute Entry, April 15, 1969 setting Hearing for Apr. 21, 1969	47
Minute Entry, April 15, 1969, Three-Judge Conference Held	48
Stipulation of Facts for Hearing on Motion for Preliminary Injunction	49
Affidavit of Louis L. Reichert	54
Affidavit of George Bethea	57

II
INDEX (Continued)

	Page
Affidavit of Earl Wendling	58
Affidavit of John M. Darsam	60
Affidavit of Edward J. Manuel, Jr.	63
Affidavit of Sheriff John F. Rowley	66
Affidavit of Herman R. Burkhardt	67
Affidavit of Jack Peebles	70
Affidavit of August M. Ledesma, Jr.	71
Answer on Behalf of Leander H. Perez, Jr.	75
Exhibits	81
Opinion	83
Appendix A	99
Appendix B	102
Judgment	106
Dissenting Opinion	108
Notice of Appeal to The Supreme Court of The United States	118
Order	119
Motion	121
Memorandum in Support of Motion	123
Order	125

DOCKET ENTRIES

AUGUST M. LEDESMA, JR.,
HAROLD J. SPEISS, and
LAWRENCE P. PITTMAN,

Plaintiffs,
versus CA No. 69-322

LEANDER H. PEREZ, JR., Individually and as District
Attorney for the Twenty-Fifth Judicial District, State
of Louisiana;

LOUIS REICHART, Individually and as Captain in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana;

GEORGE BETHEA, Individually and as a Deputy in
the Sheriff's Office in the Parish of St. Bernard, State
of Louisiana; and

EARL WENDLING, Individually and as a Deputy in
the Sheriff's Office in the Parish of St. Bernard, State
of Louisiana,

Defendants.

DATE PROCEEDINGS

2/17/69 Flg. Complaint. Issg. 4 summons. Exhibits
A & B annexed.

2/17/69 Flg. Motion for Prelim. Injunc.

2/17/69 Flg. Motion for Temp. Restr. Order; UN-
SIGNED ORDER ANNEXED.

3/ 3/69 Flg. MR. on summons; serv. Earl Wendling;
Geo. Bethea; Capt. Reichart; all in pers.
2/24/69; Leander Perez, Jr., thru Charles
Livaudais, 2/24/69.

3/11/69 Flg. M & O that complaint be amended, etc.

- 3/12/69, FJRH. Ent. 3/15/69. Issg. notices
Issg. 4 summons.
- 3/24/69 Flg. ANSWER by Louis Reichert, George
Bethea and Earl Wendling
- 3/24/69 Flg. Designation of Judges Boyle, Sr., Rubin
& Wisdom to constitute 3-Judge Court. Judge
Heebe is relieved of this case with his con-
sent and Judge Boyle is substituted as Re-
questing Judge. Ent. 3/26/69. Issg. notices.
- 3/11/69 Flg Pls' amended motion for pre. injunc.
- 3/11/69 Flg Request by Atty Peebles for 3-Judge
Court.
- 3/27/69 ORDERED that conf. is set for 4/2/69, 4PM.
Ent. 4/1/69. Issg. notices.
- 4/8/69 Flg. M & O that Pl's motion to Amend Com-
plaint be granted, etc. 4/8/69, EJB, Sr. Ent.
4/11/69 Issg. notices. ISSG. 1 SUMMONS.
- 4/11/69 Flg M.R. on summons; serv. Leander Perez
thru Charles Livaudais; Capt. Louis Reichard
thru Mrs. Reichard; George Bethea; in pers;
Earl Wendling, in pers; all on 3/27/69.
- 4/15/69 ORDERED that three-Judge hearing on pl's
motions for temp. Restraining Order and Pre-
liminary Injunc. and on merits of cause is
set for April 21, 1969, 2PM. Ent. 4/15/69
Issg. notices.
- 4/15/69 Conf. held this day; Three-Judge hearing on
pls' motions for Temp. Restraining Order and
Prel. Injunct. is set for 4/21/69, 2 PM; etc.
(Judges Wisdom, Boyle & Rubin) Ent. 4/16/69.
Issg. notices.
- 4/21/69 Flg. Stipulation of Facts for hearing on mo-
tion for Prelim. Injunct.
- 4/21/69 Flg. ANSWER of Leander Perez, Jr.

- 4/21/69 Hearing on motions of Pls for Temp Restraining Order and Prelim. Injunc.; SUBMITTED. Ent. 4/22/69.
- 5/13/69 Flg. M.R. on summons; serv. Sidney Torres, in pers., 5/6/69.
- 7/14/69 Flg. OPINION by 3-Judge Court; ORDERED that judgment be ent. decreeing: that all seized materials be returned, etc; that said materials be suppressed as evidence etc.; that prelim. and permanent injunctions be denied; that jurisdiction be retained herein for issuance of such further orders as may be necessary & proper. JMW, EJB, Sr., Judge Rubin dissents in part, etc. ORDERED that St. Bernard Parish Ordinance No. 21-60 is unconstitutional; that jurisdiction be retained herein for issuance of such further orders as may be necessary & proper. EJB, Sr., 7/14/69. Ent. 7/14/69. Issg. notices.
- 7/30/69 Flg. TRIAL REQUEST by pltf.
- 8/ 8/69 Issuing Notice to Attend Pre Trial Conference on 11/20/69 at 8:30 A. M.
- 8/13/69 Flg. JUDGMENT; ORDERED that there be judg. that all seized materials be returned instanter, by defs to pls, etc.; that said materials be suppressed as evidence, etc.; that preliminary and permanent injunctions be denied, etc.; that St. Bernard Ordinance #21-60 is unconstitutional; that jurisdiction be retained herein for issuance of further orders as may be necessary, etc. 8/13/69, ADO'B, Jr. Approved as to form, EJB, Sr. Ent. 8/14/69. Issg. notices.

- 9/12/69 Flg. Notice of Appeal by Leander H. Perez, Jr., Louis Reichart, George Bethea and Earl Wendling
- 9/15/69 Upon request of Defs-Appellants counsel, etc., it is ORDERED that Clerk is authorized, etc. to transport to Clerk of Court of Supreme Court, etc., all exhibits, etc.; FURTHER ORDERED that there be stay of Order of this Court which directed that all seized materials be returned, instanter, by defs. to those pls from whom they were seized. 9/15/69, ABR. Ent. 9/16/69. Issg. notices.
- 9/26/69 Flg. Motion of pls for partial summary judgment; Notice of Hearing, 10/15/69, 10A.M. Statement of Material Facts; Memo in favor; annexed
- 10/ 7/69 Flg. Statement of Material Facts by defs.
- 10/10/69 Flg. Notice of Appeal by Pls to Supreme Ct. from portion of Judgment. 8/14/69. Issg. notices.
- 10/15/69 Flg. Motion of defs for stay, pending appeal; UNSIGNED order annexed.
- 10/16/69 ORDERED that pre trial conf. set for 11/20/69 is CONTINUED WITHOUT DATE, pending appeals, etc. Ent. 10/17/69. Issg. notices.
- 10/15/69 Hearing on motion of Pls for partial summary judgment; CONTINUED WITHOUT DATE, etc. Ent. 10/17/69. Issg. notices.
- 9/ 3/69 Flg. Dissenting OPINION, ABR. Ent. 11/3/69. Issg. notices.

COMPLAINT FOR TEMPORARY RESTRAINING
ORDER, PRELIMINARY INJUNCTION, PERMA-
NENT INJUNCTION, DECLARATORY JUDGMENT
AND DAMAGES.

In the United States District Court
Eastern District of Louisiana
New Orleans Division

August M. Ledesma, Jr., Harold J. Speiss, and Lawrence
P. Pittman,

Plaintiffs,

versus

CA No. 69-322

Leander H. Perez, Jr., Individually and as District At-
torney for the Twenty-Fifth Judicial District, State of
Louisiana;

Louis Reichart, Individually and as Captain in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana;

George Bethea, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana; and

Earl Wendling, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana,

Defendants.

Complainants respectfully represent:

I.

Lawrence P. Pittman, residing at 512 Harang, Met-

airie, Louisiana, is domiciled in the Parish of Jefferson; August M. Ledesma, Jr., residing at 1707 Agriculture Street, New Orleans, Louisiana, is domiciled in the Parish of Orleans; and Harold J. Speiss, residing at 4841 Bonita Drive, New Orleans, Louisiana, is domiciled in the Parish of Orleans. Plaintiffs are owners of a newsstand in the Parish of St. Bernard, State of Louisiana, named the Broad Bruxelles Seafood and News Center #3.

II.

Defendant Leander H. Perez, Jr. is District Attorney for the Twenty-Fifth Judicial District, State of Louisiana; Louis Reichart is a Captain in the Sheriff's Office for the Parish of St. Bernard, State of Louisiana; George Bethea is a Deputy in the Sheriff's Office of the Parish of St. Bernard, State of Louisiana; and Earl Wendling is a Deputy in the Sheriff's Office for the Parish of St. Bernard, State of Louisiana. This action is brought against the said defendants in their official capacities and individually.

III.

This is an action for legal and equitable relief to redress the deprivation under color of statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States as provided by 42 U.S.C. 1983, and is an action under the Federal Declaratory Judgment Act, 28 U.S.C. 2201.

IV.

The jurisdiction of this Court is invoked under 28 U.S.C. 1343, this being an action authorized by law to redress the deprivation under color of state law, statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States.

V.

The jurisdiction of this Court is also invoked under 28 U.S.C. 1331, this being a civil action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum and value of \$10,000.00, and arises under the Constitution and laws of the United States.

VI.

At all times hereinafter mentioned, defendants Louis Reichart, George Bethea, and Earl Wendling, separately and in concert acted under color and pretense of law, to-wit, under color of the statutes, ordinances, regulations, customs and usages of the State of Louisiana and the Parish of St. Bernard, and particularly the Louisiana Obscenity Statute (LSA-R.S. 14:106), and St. Bernard Parish Ordinance No. 21-60. Each of the defendants herein, separately and in concert, engaged in the illegal conduct hereinafter mentioned to the injury of plaintiffs and deprived plaintiffs of their rights, privileges and immunities secured to them by the First and Fourteenth Amendments to the Constitution of the United States and the laws of the United States.

VII.

On January 27, 1969, at approximately 8:30 P.M., defendants Reichart, Bethea, and Wendling, raided the aforementioned Broad Bruxelles Seafood and News Center #3 and arrested Plaintiff August M. Ledesma, Jr. for displaying certain magazines, books, and playing cards. Defendants seized the said magazines, books, and playing cards. (A list of the publications seized has been attached as Plaintiffs' Exhibit "A", and is made a part of these pleadings).

VIII.

Defendants have instituted criminal proceedings against plaintiff Ledesma under the aforementioned Statutes for displaying the aforementioned books, magazines and playing cards. The said publications are not obscene and are protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution. The said books and magazines do not go substantially beyond customary limits of candor in the nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; the said material does not appeal to the prurient interest of the average person in the nation as a whole; and the said material is not utterly without redeeming social importance.

IX.

Defendants seized the aforementioned books and magazines and arrested plaintiff Ledesma prior to any

judicial adversary hearing on the issue of obscenity, in violation of the free speech and press provisions of the First and Fourteenth Amendments.

X.

The aforementioned search, seizure, and arrest was made without a search or arrest warrant of any kind and was conducted upon the sole, arbitrary, capricious, and non-judicial determination by the said defendants that the magazines or books were obscene. Each of the defendants, separately, and in concert, acted outside the scope of his jurisdiction and without authorization of law, and each of the defendants, separately and in concert acted willfully, knowingly and purposefully under color and pretense of the law, and more particularly under color and pretense of LSA-R.S. 14:106, being the Obscenity Statute of the State of Louisiana, and St. Bernard Ordinance No. 21-60.

XI.

Defendants have retained the said books and magazines in their custody, possession, and/or control.

XII.

The conduct of the defendants, as aforesaid, in designating obscene material which in fact and in law is not obscene has dissipated plaintiffs' efforts to have their said material sold and accepted as it is; i.e., non-obscene adult works of interest to the average normal adult person living in the Parish of St. Bernard, State of Louisiana.

XIII.

The aforesaid conduct of the defendants has tended to defame plaintiffs in their trade and business and interferes with plaintiffs' advantageous business relations.

XIV.

As a result of defendants' conduct, as aforesaid, plaintiff Ledesma has been required to retain an attorney to defend him against unfounded criminal charges, based upon an obscenity law known or which should be known by defendants to be in violation of the Federal Constitutional guarantees and with regard to material which the defendants know or should know is protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

XV.

Plaintiffs desire to continue to keep for sale and to sell non-obscene material without interference, harassment and intimidation by defendants, or any other person acting under color of law.

XVI.

The defendants, their agents, servants and employees, unlawfully, willfully, knowingly and deliberately, have deprived, and continue to deprive, plaintiffs of their rights, privileges and immunities secured to them by the United States Constitution:

- (A) By deciding, contrary to the applicable decisions of the United States Supreme Court, and other Appellate Courts of competent jurisdiction and contrary to the Constitution, to arbitrarily forbid the keeping for sale and selling of non-obscene material dealing with sex;
- (B) By arbitrarily and capriciously deciding to act as censors of constitutionally protected material under subjective standards formulated by defendants, their agents, servants and employees, contrary to law, all for the purpose of depriving the residents of the Parish of St. Bernard, State of Louisiana, access to non-obscene material dealing with sex;
- (C) By arresting plaintiff Ledesma, and threatening to make future similar arrests if material such as that seized is again displayed, which has the effect of coercing plaintiffs into refraining from selling non-obscene material dealing with sex.

XVII.

By reason of the conduct of defendants, as aforesaid, plaintiffs' civil rights under the First, Fourth, Fifth Eighth, Ninth and Fourteenth Amendments to the United States Constitution have been violated to their irreparable harm. Unless enjoined, defendants will continue in the course of conduct to plaintiffs' further imminent and irreparable harm, for which plaintiffs have

no adequate remedy at law. Immediate and irreparable injury, loss, and damage will result to plaintiffs if a temporary restraining order is not issued forbidding defendants from continuing in the conduct aforementioned.

XVIII.

The aforementioned search, seizure, and arrest, having been made without first obtaining a warrant of any kind, and having been made without a prior adversary judicial hearing of any kind, were unlawful and unreasonable and in violation of plaintiffs' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

XIX.

The aforementioned search, seizure, and arrest were made under color of a State Statute, LSA-R.S. 14:106, and St. Bernard Parish Ordinance 21-60, which are unconstitutional on their face and as applied in this case.

XX.

As a result of the unauthorized, illegal, willfull and intentional interference with the conduct of plaintiffs' business and the deprivation by defendants of plaintiffs' rights secured by the Constitution and laws of the United States as aforesaid, plaintiffs have been damaged in the sum of \$30,000.00 each.

XXI.

Plaintiffs are entitled to and demand trial of the aforementioned facts by jury.

XXII.

St. Bernard Parish Ordinance No. 21-60 is clearly unconstitutional on its face, in violation of the Constitution of the United States, for the following reasons:

- (A) The said Ordinance is vague and does not define the acts sought to be denounced with such precision that the person sought to be held accountable may know whether his conduct falls within the purview of the act;
- (B) The said Ordinance, to the extent that it attempts to provide standards for determining obscenity, sets forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court;
- (C) The said Ordinance does not include the necessary *scienter* requirements for obscenity in that it does not require that the person sought to be held accountable have knowledge of the fact of obscenity of the material involved.

XXIII.

St. Bernard Parish Ordinance No. 21-60 was uncon-

stitutionally applied in the case of the aforementioned seizure and arrest, for the following reasons:

- (A) The said Ordinance lacks procedural safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled;
- (B) The said Ordinance, in conjunction with the other laws of the State of Louisiana, denies to the person sought to be held accountable the right to trial by jury.

XXIV.

Plaintiffs are entitled to and desire that this Court enter a declaratory judgment under the provisions of 28 U.S.C. Section 2201, declaring St. Bernard Parish Ordinance 21-60 to be in violation of the Constitution of the United States, and plaintiffs are further entitled to and desire that under the same authority this Court declare any application of the aforementioned Ordinance to the sale of magazines and books in public newsstands to be unconstitutional. Plaintiffs further request that this Court declare the magazines and books seized to be non-obscene.

XXV.

On February 10, 1969, defendant Leander H. Perez, Jr., by his assistant, Charles Livaudais, filed criminal charges in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana, charging in four separate Bills of Information, that plaintiff

Ledesma committed the crime of Obscenity. Said charges arose directly out of and were based solely upon the aforementioned arrest of plaintiff. Two of the Bills (Nos. 17-087 and 17-088) alleged violation of St. Bernard Parish Ordinance 21-60, and two Bills (Nos. 17-085 and 17-086) alleged violation of LSA-R.S. 14:106.

XXVI.

The foregoing Statute and Ordinance are being enforced in bad faith by the aforementioned prosecutions.

XXVII.

The patent unconstitutionality of St. Bernard Parish Ordinance 21-60, on its face and as applied in this case, which Ordinance purports to regulate freedom of expression, justifies and requires federal equitable relief from state criminal prosecution.

XXVIII.

As a result of the aforementioned, plaintiffs are entitled to a declaratory judgment declaring their seized publications to be non-obscene and declaring St. Bernard Parish Ordinance 21-60 to be unconstitutional. Plaintiffs are further entitled to damages, and an injunction, restraining and enjoining defendants, and each of them, and persons in active concert or participation with them, from continuing the following unauthorized and unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Ordinance No. 21-60 by seizing plaintiffs' magazines and/or books;
- (B) Enforcing or executing St. Bernard Ordinance No. 21-60 by arresting plaintiffs or their employees under color of authority of said Ordinance;
- (C) Alternatively, should the said Ordinance be held Constitutional, by enforcing the said Ordinance through the making of searches, seizures, and arrests without first obtaining a lawful warrant and conducting an adversary judicial proceeding.
- (D) Continuing to prosecute plaintiff Ledesma in the criminal cases filed against him arising out of the aforementioned arrest.

WHEREFORE, plaintiffs pray:

- (1) That a temporary restraining order issue immediately from this Court, restraining defendants herein from seizing magazines or books in the possession of plaintiffs while the said books or magazines are on the premises of newsstands open to the public within the Parish of St. Bernard, State of Louisiana, without first obtaining an appropriate warrant of search, seizure, or arrest, duly executed under laws of the State of Louisiana or in the United States of America, and after an appropriate adversary judicial proceeding;
- (2) That defendants be required to Answer this Com-

plaint in conformity with the rules and practice of this Honorable Court;

(3) That a declaratory judgment be entered herein declaring St. Bernard Ordinance 21-60 to be unconstitutional, or in the alternative, that this Court declare an application of the aforementioned Ordinance to the public exhibition or sale of magazines and books to be unconstitutional;

(4) That this Court declare plaintiffs' seized publications (Exhibit "A") to be non-obscene;

(5) That this Court issue a permanent injunction restraining and enjoining defendants, and each of them, from continuing the following unauthorized and unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Parish Ordinance 21-60 by seizing magazines or books in the custody of plaintiffs;
- (B) Enforcing or executing St. Bernard Parish Ordinance 21-60 by arresting plaintiffs or plaintiffs' employees under color of authority of the said Ordinance;
- (C) Retaining in their possession and not returning the books and magazines previously seized by defendants;
- (D) In the alternative, should St. Bernard Parish Ordinance 21-60 be held to be constitutional, plaintiffs pray that defendants

be permanently restrained from seizing magazines or books in plaintiff's possession while the said books or magazines are on the premises of newsstands, without first obtaining an appropriate warrant and after an appropriate adversary judicial proceeding;

(E) Continuing to prosecute plaintiff Ledesma in the criminal cases filed against him arising out of the aforementioned arrest.

(6) That judgment be rendered herein for damages in favor of plaintiffs and against defendants, Louis Reichart, George Bethea, and Earl Wendling, jointly, severally, and in solido on behalf of each plaintiff in the sum of \$30,000.00.

(7) That plaintiff have such other relief as may be appropriate under the circumstances together with the costs of this action.

Respectfully submitted,

(Signed) JACK PEEBLES
 JACK PEEBLES
 Attorney for Plaintiff
 4438 Gen. Pershing Street
 New Orleans, Louisiana 70125
 865-7163

STATE OF LOUISIANA
PARISH OF ORLEANS

AUGUST M. LEDESMA, JR., being first duly sworn upon oath, deposes and says: That he is one of the plaintiffs in the above entitled matter, that he has read the foregoing Complaint and that it is true as he verily believes.

(Signed) AUGUST M. LEDESMA, JR.
AUGUST M. LEDESMA, JR.

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 15th DAY OF FEBRUARY, 1969.
/s/ ADOLPH J. LEVY
NOTARY PUBLIC

(Certificate of Service omitted)

PLAINTIFF'S EXHIBIT A

The property listed below was taken from Mr. August M. Ledesma, Jr. W/M 34, residing at 1707 Agriculture St. New Orleans, La. who was arrested from the B & B address as noted below.

Monday, January 27, 1969
9:45 P.M.

Charge with Parish Ordinance # 21-60
Section 6 and R.S. 14:106 Article, Paragraph 2 & 3.

The following is a list of books taken from the B & B Bookstore at 7403 N. Claiborne Ave., Arabi, La.:

	Informal Nudist	\$2.50
	Nudist Adventure	\$2.50
	Weekend Nudist	\$2.50
	Nakes Ego	\$2.50
	Sun Buffs	\$2.50
	Weekend Nudist	\$2.50
	Nudist Adventure	\$2.50
	Sunrise 15	\$2.50
	Nudist Adventure	\$2.50
	Scam	\$2.50
	Naked Films	\$2.50
	Naked Love	\$2.50
	Female Figure Studies (Book 3)	\$3.00
	Female Figure Studies (Book 4)	\$3.00
	Teenage Nudist	\$3.00
	Film & Figure	\$3.00
	Teenage Nudist	\$3.00
	Arcadia	\$3.00
	Jaybird Happening	\$3.00
	Arcadia	\$3.00
	The Wild Cats	\$3.00
	1969 Beauty Calendar	\$3.00
TOTAL	Weekend Jaybird	\$3.00
	Dolls & Dolls	\$3.00
	Arcadia	\$3.00
45 BOOKS	Sweden	\$3.50
	Skin Game	\$3.50
	'69 Nudies	\$3.50
	Skin Game	\$3.50
	Skin Game	\$3.50

Denmark	\$3.50
Nudism Tody	\$2.00
Sundial 44	\$2.00
'69 Naked Calendar	\$2.00
Chapagne	\$2.00
Spread Eagle	\$5.00
The Three Little Bares	\$5.00
Fancy Pants	\$5.00
Exclusive	\$5.00
The Three Little Bares	\$5.00
Spread Eagle	\$5.00
Twin Pak	\$4.00
Zinger	\$4.00
Sensation	\$4.00
Twin Pak	\$4.00
1-deck playing cards-Honey brand	\$1.50
1-deck playing cards- Palygirl brand	\$1.50
2-decks playing cards- Gaiety Brand @1.50	\$3.00
1-\$5.00 bill of currency Serial #C47637359A	\$5.00
1-\$5.00 bill of currency Serial #F74735575A	\$5.00

Received by:
Capt.
L. Reichard

MOTION FOR PRELIMINARY INJUNCTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Feb. 17, 1969

Now come Plaintiffs, August M. Ledesma, Jr., Harold J. Speiss, and Lawrence P. Pittman, who move the Court for a Preliminary Injunction enjoining Defendants, and each of them, and their agents, servants, employees and attorneys, and all persons in active concert or participation with them:

- 1) From future enforcement of St. Bernard Parish Ordinance 21-60, in any manner against the Plaintiffs or their employees, in pending or future cases, or from issuing or causing the issuance of any Complaint, Warrant, or of arrest or Summons based upon an alleged violation of the said Ordinance;
- 2) From engaging in any other conduct which might in any way interfere with the keeping for sale or selling of material which is protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution;

- 3) From seizing books, magazines or other publications or from engaging in any conduct which might in any way interfere with the keeping for sale or selling of material by Plaintiffs without first obtaining a judicial determination, after adversary proceedings, concerning the obscenity of the material, and after the issuance of a proper Warrant.
- 4) From prosecuting Plaintiff August M. Ledesma, Jr. in cases numbered 17-085 through 17-088 in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana.
- 5) From retaining in their possession and not returning to Plaintiffs the publications seized at Plaintiffs' newsstand on January 27, 1969.
- 6) From interfering with Plaintiffs' sale of the publications seized at Plaintiffs' newsstand on January 27, 1969.

If Defendants are not so ordered and enjoined, immediate irreparable harm will result to Plaintiffs, and Plaintiffs will be deprived of rights secured to them by the First Amendment to the United States Constitution, as more particularly described in Plaintiffs' Complaint and Affidavit filed herein. Plaintiffs have no adequate remedy at law as shown by their Memorandum and Complaint. If this Preliminary Injunction be

granted, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable.

Respectfully submitted,

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

MOTION FOR TEMPORARY RESTRAINING ORDER

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Feb. 17, 1969

Plaintiffs, August M. Ledesma, Jr., Harold J. Speiss and Lawrence P. Pittman, move the Court for a Temporary Restraining Order, enjoining Defendants, Louis Reichart, George Bethea, and Earl Wendling, and their agents, servants, employees and attorneys, and all persons in active concert or participation with them:

From seizing books, magazines, or other publications under color of authority of LSA-R.S. 14:106 or Ordinance No. 21-60 of the Parish of

St. Bernard, State of Louisiana, or from engaging in any conduct which might in any way interfere with the keeping for sale or selling of material by Plaintiffs, without first obtaining a judicial determination, after adversary proceedings, concerning the obscenity of the material, and after the issuance of a proper Warrant of Search, Seizure, or Arrest.

Plaintiffs further move that the Court temporarily restrain the prosecution of Plaintiff August M. Ledesma, Jr. for obscenity in the Twenty-Fifth Judicial District Court, resulting from his arrest on January 27, 1969, by Defendants.

If Defendants are not so ordered and enjoined immediately, irreparable harm will result to Plaintiffs and Plaintiffs will be deprived of rights secured to them by the First Amendment to the United States Constitution, as more particularly described in Plaintiffs' Complaint and Affidavit filed herein. Plaintiffs have no adequate remedy at law as shown by their Complaint and Affidavit. If this Temporary Restraining Order be granted, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable.

The undersigned counsel for Plaintiff has advised Mr. Charles Livaudais, Assistant District Attorney for the Parish of St. Bernard, that an attempt would be made to obtain this Temporary Restraining Order; the said Charles Livaudais has been notified of the time and place that this matter would be presented to the Court, and has been provided with copies of the pleadings herein.

Respectfully submitted,

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, ADOLPH J. LEVY, the undersigned authority, a Notary Public, duly qualified, commissioned and sworn, in and for the Parish of Orleans, State of Louisiana, personally came and appeared:

AUGUST M. LEDESMA, JR., who, upon being first duly sworn, did depose and say:

That he is a resident of the Parish of Orleans, State of Louisiana, and presently resides at 1707 Agriculture Street, New Orleans, Louisiana;

That he is a partner with Lawrence P. Pittman and Harold J. Speiss, and as partners they are proprietors of and owners of the Broad Bruxelles Seafood and News Center #3, a newsstand located at 7403 North Claiborne Avenue in the Parish of St. Bernard, State of Louisiana; the principal business of the said newsstand is the retail selling of magazines, newspapers, and books to the public;

That on January 27, 1969, at approximately 8:30 P. M., he was arrested at the aforementioned newsstand by Captain Louis Reichart, and Deputy George Bethea, and Deputy Earl Wendling, of the Sheriff's Office for the Parish of St. Bernard; that he was booked by the aforementioned Police Officers and later charged with violating LSA-R.S. 14:106 and St. Bernard Parish Ordinance No. 21-60, as a result of the display and/or possession of magazines and books at the aforementioned newsstand; at the time of affiant's aforementioned arrest, many publications, including books and magazines, were seized at the aforementioned newsstand by the arresting Officers;

The aforementioned Police Officers further threatened to prosecute affiant if he did not remove remaining copies of the seized magazines from the premises of the newsstand;

The arrest and seizure occurred without an adversary judicial hearing having been first held on the question of the obscenity of the publications involved, and without affiant having been presented with a Search or Arrest Warrant;

That, as a result of the aforementioned arrest, seizures, and threats, affiant was compelled to and did in fact remove many magazines and publications from display and sale at the aforementioned newsstand, and said arrest, seizures, and threats have interfered with his business and trade relations and have deprived him of his rights to freedom of speech and press;

That affiant verily believes that the conduct of the
aforementioned defendants will continue to affiant's
irreparable damage unless defendants are enjoined
by this Court.

(Signed) AUGUST M. LEDESMA, JR.
AUGUST M. LEDESMA, JR.

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 15th DAY OF FEBRUARY, 1969.
/s/ ADOLPH J. LEVY
NOTARY PUBLIC

MOTION AND ORDER TO AMEND COMPLAINT

In the United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Mar. 11, 1969

Plaintiffs, through undersigned counsel, and upon
suggesting to the court that defendants have not filed
an Answer herein, move to amend their original Com-
plaint filed herein in the following particulars:

1. By striking paragraph "XXIV" and substituting
the following in its place:

"LSA-R.S. 14:106 is unconstitutional on its face and as applied in this case for the same reasons alleged herein regarding St. Bernard Parish Ordinance No. 21-60. Plaintiffs desire that this Court enter a declaratory judgment under the provisions of 28 U.S.C. 2201, declaring St. Bernard Parish Ordinance 21-60 and LSA-R.S. 14:106 to be in violation of the Constitution of the United States, and Plaintiffs further desire that under the same authority this Court declare any application of the aforementioned Ordinance or Statute to the sale of magazines and books in public newsstands to be unconstitutional. Plaintiffs further desire that this Court declare the aforementioned arrest of Plaintiff Ledesma, which occurred in the absence of a warrant or prior adversary judicial hearing, to be unconstitutional."

2. By striking paragraph "XXVII" and substituting the following in its place:

"The foregoing Statute and Ordinance purport to regulate freedom of expression. The patent unconstitutionality of the said Statute and Ordinance justifies and requires Federal equitable relief from State criminal prosecution."

3. By striking paragraph "XXVIII" and substituting the following in its place:

"As a result of the aforementioned, Plaintiffs are entitled to a declaratory judgment declaring the said Statute and Ordinance to be unconstitutional. Plaintiffs are further entitled to damages, and an injunction, restraining and enjoining Defendants, and persons in

active concert or participation with them, from continuing the following unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Ordinance No. 21-60 or LSA - R.S. 14:106 by arresting Plaintiffs or seizing Plaintiffs' publications or prosecuting Plaintiffs under color of authority of said Ordinance or Statute;
- (B) Alternatively, should the said Ordinance or Statute be held constitutional, by enforcing the said Ordinance or Statute through the making of searches, seizures, or arrests without first obtaining a lawful warrant and conducting an adversary judicial proceeding."

4. By striking the Prayer and substituting in its place the Prayer of this Amendment.

WHEREFORE, Plaintiffs pray:

- (1) That this Amendment be allowed;
- (2) That a Temporary Restraining Order issue immediately from this Court, restraining Defendants herein from seizing magazines or books in the possession of Plaintiffs while the said magazines or books are on the premises of newsstands open to the public within the Parish of St. Bernard, State of Louisiana, without first obtaining an appropriate warrant of search, seizure, or arrest, and after an appropriate adversary judicial proceeding;

(3) That in due course a Declaratory Judgment be entered herein declaring St. Bernard Ordinance 21-60 and LSA-R.S. 14:106 to be unconstitutional, or in the alternative, that this Court declare any application of the said Statute or Ordinance to the public exhibition or sale of magazines and books to be unconstitutional;

(4) That this Court issue a Preliminary and Permanent Injunction restraining and enjoining Defendants from continuing the following unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Ordinance No. 21-60 or LSA-R.S. 14:106 by arresting Plaintiffs or seizing Plaintiffs' publications or prosecuting Plaintiffs under color of authority of said Ordinance or Statute;
- (B) Alternatively, should the said Ordinance or Statute be held constitutional, by enforcing the said Ordinance or Statute through the making of searches or seizures of books or magazines, or making arrests based upon the possession or sale of books or magazines, without first obtaining a lawful warrant and conducting an adversary judicial proceeding;
- (C) Retaining in their possession and not returning the books, magazines, and other publications previously seized by Defendants from the Broad Bruxelles Seafood and Newscenter # 3;

(D) Continuing to prosecute Plaintiff Ledesma in the criminal cases filed against him arising out of his aforementioned arrest;

(5) That judgment be rendered herein for damages in favor of Plaintiffs and against Defendants Louis Reichart, George Bethea, and Earl Wendling, jointly, severally, and in solido on behalf of each Plaintiff in the sum of THIRTY THOUSAND DOLLARS (\$30,000.-00);

(6) That this Court convene for the purpose of hearing and determining this Application for Declaratory Judgment and Permanent Injunction, a Statutory Court of three Judges, at least one of whom shall be a Circuit Judge, in accordance with the provisions of Sections 2281 and 2284, Title 28, United States Code.

(7) That Plaintiffs have such other relief as may be appropriate under the circumstances together with the costs of this action.

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

ORDER

The foregoing Motion to Amend Complaint considered, and it appearing that no responsive pleading has been filed in answer to the said Complaint;

IT IS ORDERED that Plaintiffs' Complaint be amended in the particulars prayed for.

New Orleans, Louisiana, this 12th day of March, 1969.

(Signed) FREDERICK J. R. HEEBE
JUDGE

(Certificate of Service omitted)

United States District Court
Eastern District of Louisiana
New Orleans Division
March 15, 1969

CLERK'S OFFICE

New Orleans, La.

(Title omitted in printing)

Jack Peebles, Esq., 4438 Gen. Pershing St., N.O., La.

Attorneys for Parties:

In accordance with Rule 77(d) of the Federal Rules of Civil Procedure, you are hereby notified that the

Court (Judge Frederick J. R. Heebe) has on 3/12/69 rendered an order that Plaintiff's Complaint be amended, etc. Ent. 3/15/69.

Very truly yours,

A. DALLAM O'BRIEN, JR.,
CLERK

(Signed) NELSON B. JONES
Chief Deputy Clerk

ANSWER ON BEHALF OF LOUIS REICHERT,
GEORGE BETHEA AND EARL WENDLING

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Mar. 24, 1969

Now into Court comes the defendants, Louis Reichert, George Bethea and Earl Wendling and for answer to the complaint of the petitioners aver that:

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction in that the amount in the civil matter does not exceed the statutory requirements.

THIRD DEFENSE

Defendants answer the complaint as follows:

1.

For want of sufficient information to justify belief, Paragraph 1 is denied.

2.

Defendants admit their names and status as outlined in Paragraph 2.

3.

Paragraph 3 of the complaint is denied.

4.

Paragraph 4 of the complaint is denied.

5.

Paragraph 5 of the complaint is denied.

6.

Defendants deny Paragraph 6 of the complaint except to admit that defendants were acting under a valid statute of the State of Louisiana and the Parish of St. Bernard in the regular performance of their duties.

7.

Defendants deny that any raid was committed as outlined in Paragraph 7 of the complaint and admit that plaintiff, August M. Ledesma, Jr. was arrested in violation of the statutes as enumerated. And, admit that certain publications were taken as evidence from the establishment incident to the arrest.

8.

Defendants have no right or authority to institute criminal prosecution and deny the remainder of Article 8 of the complaint.

9.

Defendants admit that certain publications were taken incident to the arrest and deny the remainder of Paragraph 9 of the complaint.

10.

Paragraph 10 of the complaint is denied, defendants further stating that a search warrant was not required as the pamphlets taken were taken incident to the arrest.

37

11.

Paragraph 11 of the complaint is denied.

12.

Paragraph 12 of the complaint is denied.

13.

Paragraph 13 of the complaint is denied.

14.

Paragraph 14 of the complaint is denied.

15.

For want of sufficient information to justify belief
Paragraph 15 is denied.

16.

Paragraph 16 of the complaint is denied.

17.

Paragraph 17 of the complaint is denied.

18.

Paragraph 18 of the complaint is denied.

38

19.

Defendants admit that they acted in good faith under valid constituted statute and deny the remainder of Paragraph 19 of the complaint.

20.

Paragraph 20 of the complaint is denied.

21.

Paragraph 21 of the complaint is a legal conclusion and requires no answer.

22.

Paragraph 22 of the complaint is denied.

23.

Paragraph 23 is denied.

24.

Paragraph 24 of the complaint is denied.

25.

Paragraph 25 requests admissions of public records and said public records are the best evidence of themselves.

39

26.

Paragraph 26 is denied.

27.

Paragraph 27 of complaint is denied.

28.

Paragraph 28 of the complaint is denied.

FOURTH DEFENSE

Defendants aver that they acted in good faith under a valid constituted statute that they believe to be valid and constitutional.

WHEREFORE, defendants demand judgment in their favor and against plaintiffs, rejecting plaintiffs' claims with costs.

CRONVICH & WAMBSGANS
3714 Airline Highway
Metairie, La. 834-8866,
Attorneys for Defendants
Louis Reichert, George Bethea
and Earl Wendling

(Signed) A. W. WAMBSGANS

A. W. WAMBSGANS

(Signed) ROBERT I. BROUSSARD

ROBERT I. BROUSSARD

848 Second St. Gretna, La.

361-3185

(Certificate of Service Omitted)

UNITED STATES COURT OF APPEALS

Fifth Circuit

March 19, 1969

John R. Brown

Chief Judge

Houston, Texas 77002

Mr. A. Dallam O'Brien, Clerk
Eastern District of Louisiana
Room 306, 400 Royal Street
New Orleans, Louisiana 70130

C.A. No. 69-322, August M.
Ledesma, Jr., et al v. Leander
H. Perez, Jr., et al

My dear Mr. O'Brien:

In view of the fact that this case raises identical questions as in C.A. No. 68-1927, Delta Book Distributors, Inc., et al. v. Alwynn J. Cronvich, et al., Judge Heebe is relieved of this case with his consent and Judge Boyle is substituted as the Requesting Judge. I have constituted the Court in accordance with the enclosed designation order which I request you to file. I also enclose the complaints, in reference to this matter, which were sent to me by Judge Heebe.

Copies of this order are being sent to the Judges.

Sincerely yours

erb

2 Encl.

cc: Honorable John M. Wisdom

Honorable Frederick J. R. Heebe

Honorable Edward J. Boyle, Sr.

Honorable Alvin B. Rubin

DESIGNATION OF JUDGES BOYLE, SR., RUBIN &
WISDOM TO CONSTITUTE 3-JUDGE COURT

In the United States District Court
for the Eastern District of
Louisiana

(Title omitted in printing)

Filed: Mar. 24, 1969

(1) Requesting Judge: Honorable Edward J. Boyle,
Sr., Eastern District of Louisiana

(2) District Judge: Honorable Alvin B. Rubin
Eastern District of Louisiana

(3) Circuit Judge: Honorable John M. Wisdom

(4) Date of Order: March 19, 1969

The Requesting Judge (1) above named to whom an
application for relief has been presented in the above

cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See *Jackson v. Choate*, 5 Cir., 1968, 404 F.2d 910, [Misc. No. 1071, Nov. 29, 1968], *Jackson v. Department of Public Welfare of the State of Florida*, S.D. Fla., 1968, ____ F. Supp. ____; *Smith v. Ladner*, S.D. Miss., 1966, 260 F. Supp. 918.

(Signed) JOHN R. BROWN
JOHN R. BROWN
Chief Judge
Fifth Circuit

**PLAINTIFFS' AMENDED MOTION FOR PRE-
LIMINARY INJUNCTION**

**United States District Court
Eastern District of Louisiana
New Orleans Division**

(Title omitted in printing)

Filed: Mar 11, 1969

Plaintiffs August M. Ledesma, Jr., Harold J. Speiss, and Lawrence P. Pittman, amend their Motion for Preliminary Injunction which they have previously filed herein, and move that a Statutory Court of three judges issue a Preliminary Injunction of enjoining Defendants, and each of them, and their agents, servants, employees and attorneys, and all persons in active concert or participation with them:

1) From enforcing or executing St. Bernard Ordinance No. 21-60 or LSA-R.S. 14:106 by arresting Plaintiffs or seizing Plaintiffs' publications or prosecuting Plaintiffs under color of authority of said Ordinance or Statute;

2) From seizing books, magazines or other publications or from engaging in any conduct, including arresting Plaintiffs, which might in any way interfere with the keeping for sale or selling of material by Plaintiffs without first obtaining a judicial determination, after adversary proceedings, concerning the obscenity of the material, and after the issuance of a proper warrant.

3) From prosecuting Plaintiff August M. Ledesma, Jr. in cases numbered 17-085 through 17-088 in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana.

4) From retaining in their possession and not returning to Plaintiffs the publications seized at Plaintiffs' newsstand on January 27, 1969.

If Defendants are not so ordered and enjoined, immediate irreparable harm will result to Plaintiffs, and Plaintiffs will be deprived of rights secured to them by the First Amendment to the United States Constitution, as more particularly described in Plaintiffs' Complaint and Affidavit filed herein. Plaintiffs have no adequate remedy at law. If this Preliminary Injunction be granted, the injury, if any, to Defendants herein, if final judgment be in their favor, will be considerable.

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

(Certificate of Service omitted)

Minute Entry
March 27, 1969
BOYLE, J.

(Title omitted in printing)

IT IS ORDERED that a conference be, and it is hereby, set for Wednesday, April 2, 1969, at 4:00 P.M., in the captioned cause.

(Certificate of Service omitted)

PLAINTIFFS' MOTION TO AMEND COMPLAINT

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Apr. 6, 1969

Plaintiffs move to amend their Complaint filed herein for the following reasons:

I.

Since the filing of this action, defendant Leander H. Perez, Jr. has filed all of the magazines and other publications which were seized from plaintiffs into evidence in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana. By such

action, the said publications entered the custody of the Clerk of the said Court. Consequently, the said Clerk must be made a party-defendant herein in order for this court to effectively assert jurisdiction over the said publications.

II.

Therefore, plaintiffs move to amend their Complaint by adding as a defendant: SIDNEY D. TORRES, individually and as Clerk of Court of the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana, and further move to amend their Complaint by adding the following paragraph "XXIX":

"Defendant Sidney D. Torres is Clerk of the Twenty Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana. He received from the aforementioned defendants and now has in his custody and possession the magazines and other publications seized in the raid complained of by plaintiffs herein. He will not release the said magazines and other publications to plaintiffs."

WHEREFORE, Plaintiffs pray that this Amendment be allowed and that in due course judgment be rendered as prayed for in the Complaint and First Amended Complaint filed herein, except that there be no judgment for damages rendered against Sidney D. Torres.

Respectfully submitted,

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

ORDER

IT IS ORDERED that Plaintiffs' Motion to Amend Complaint be granted and the Complaint is amended in all particulars prayed for by the plaintiffs.

New Orleans, Louisiana, this 8th day of April, 1969.

(Signed) EDW. J. BOYLE, SR.
JUDGE

(Certificate of Service omitted)

Minute Entry
April 15, 1969
WISDOM, J.
BOYLE, J.
RUBIN, J.

(Title omitted in printing)

IT IS ORDERED that the Three-Judge Court hearing on plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction and on the merits of this

cause be, and it is hereby, set for Monday, April 21, 1969, at 2:00 P.M.

(Certificate of Service omitted)

Minute Entry
 April 15, 1969
 WISDOM, J.
 BOYLE, J.
 RUBIN, J.

(Title omitted in printing)

In conference held this day with counsel for the parties in this cause it was agreed that:

1. A consolidated Three-Judge Court hearing on plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction and on the merits be set for Monday, April 21, 1969 at 2:00 P.M. in Room 416, 400 Royal Street, New Orleans, Louisiana.
2. All evidence required for adjudication of all issues shall be presented by stipulations of facts and affidavits, unless the Court determines on hearing that oral testimony of witnesses is desired.
3. The issue of damages prayed for shall be served.
4. Answer shall be forthwith filed by the defendant Honorable Leander H. Perez, Jr.

5. The Honorable Leander H. Perez, Jr., District Attorney for the 25th Judicial District, Parish of St. Bernard, State of Louisiana, would cause the trials in State of Louisiana v. August M. Ledesma, Jr., Nos. 17-085 and 17-086 of the docket of the 25th Judicial District Court for the Parish of St. Bernard, State of Louisiana, now set for April 21, 1969, to be continued to April 28, 1969.

(Certificate of Service omitted)

STIPULATION OF FACTS FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: April 21, 1969

All parties stipulate, that, for the purposes of the Hearing on the Motion for Preliminary Injunction only, the following facts are true:

1.

Plaintiffs are the owners and operators of a newsstand in the Parish of St. Bernard, State of Louisiana, named the Broad-Bruxelles Seafood and News Center No. 3 and were so on January 27, 1969.

Leander H. Perez, Jr. is the duly elected District Attorney for the 25th Judicial District of the State of Louisiana, embodying the Parishes of St. Bernard and Plaquamines, Louis L. Reichart, George Bethea and Earl Wendling are law officers of the Sheriff's Office of the Parish of St. Bernard and were so on January 27, 1969. Throughout this entire occurrence all of the defendants were acting in their above stated official capacities.

On January 27, 1969, at approximately 9 o'clock P.M. defendants Reichart, Bethea and Wendling arrested plaintiff August M. Ledesma, Jr. at the Broad-Bruxelles Seafood and News Center No. 3 at Arabi, St. Bernard Parish, Louisiana, and booked him with Violation of Louisiana Revised Statute Title 14:106 and St. Bernard Parish Police Jury Ordinance 21-60, relative to Obscenity. Prior to the arrest defendant Wendling had purchased two publications from plaintiff Ledesma and defendant Leander H. Perez, Jr. has filed Bills of Information before the 25th Judicial District Court for the Parish of St. Bernard, said Bills being based upon the aforementioned sale to Wendling. At the same time that plaintiff Ledesma was arrested on January 27, 1969 defendants Reichert, Bethea and Wendling took from plaintiff's establishment certain publications and playing cards listed on document "Stipulation-1", attached hereto, and defendant Leander H. Perez, Jr. has filed Bills of Information against plaintiff Ledesma in the 25th Judicial District Court for the Parish of St. Bernard, said Bills being based upon plaintiff's possession and exhibition of the aforementioned publications and playing cards.

No warrant of anykind had been obtained by defendants prior to the arrest of Ledesma on January 27, 1969, and no prior adversary judicial hearing had been held, and no judicial scrutiny by any judge or magistrate was made, relative to the nature of the publications and playing cards prior to the arrest.

No other publications or items have been taken from plaintiffs established by defendant, other than those listed on exhibit "Stipulation - 1".

Defendant Leander H. Perez, Jr. has entered a Nolle Prosequi in each one of the Bills of Inforcation relative to Violations of the St. Bernard Parish Police Jury Ordinance. The remaining two cases relative to Violations of the State Statute are pending trial.

Plaintiffs are still actively engaged in their business of selling publications, food and other items at their establishment in question herein except; however, they are no longer selling the same type of magazines and playing cards in question herein.

Respectfully submitted,

LEANDER H. PEREZ, JR.,
DISTRICT ATTORNEY AND
CHARLES H. LIVAUDAIS,
ASSISTANT DISTRICT
ATTORNEY

(Signed) CHARLES H. LIVAUDAIS
CHARLES H. LIVAUDAIS

A. W. WAMBSGANS,
3714 Airline Highway,
Metairie, Louisiana
Attorney for Defendants.

(Signed) JACK PEEBLES
JACK PEEBLES,
4428 General Pershing Street,
New Orleans, Louisiana
Attorney for Plaintiff.

The property listed below was
taken from Mr. August M. Ledesma, Jr.
W M 34, residing at 1707 Agriculture St.
New Orleans, La. who was arrested from
the B & B address as noted below.

Monday, January 27, 1969
9:45 P.M.

Charge with Parish Ordinance # 21-60
Section 6 and R.S. 14:106 Article, Paragraph 2 & 3.

The following is a list of books taken
from the B & B Bookstore at 7403 N.
Claiborne Ave, Arabi, La.:

Informal Nudist	\$2.50
Nudist Adventure	\$2.50
Weekend Nudist	\$2.50
Nakes Ego	\$2.50

	Sun Buffs	\$2.50
	Weekend Nudist	\$2.50
	Nudist Adventure	\$2.50
	Sunrise 15	\$2.50
	Nudist Adventure	\$2.50
	Scam	\$2.50
	Naked Films	\$2.50
	Naked Love	\$2.50
	Female Figure Studies (Book 3)	\$3.00
	Female Figure Studies (Book 4)	\$3.00
	Teenage Nudist	\$3.00
	Film & Figure	\$3.00
	Teenage Nudist	\$3.00
	Arcadia	\$3.00
	Jaybird Happening	\$3.00
	Arcadia	\$3.00
	The Wild Cats	\$3.00
	1969 Beauty Calendar	\$3.00
TOTAL	Weekend Jaybird	\$3.00
	Dolls & Dolls	\$3.00
	Arcadia	\$3.00
45 BOOKS	Sweden	\$3.50
	Skin Game	\$3.50
	'69 Nudies	\$3.50
	Skin Game	\$3.50
	Skin Game	\$3.50
	Denmark	\$3.50
	Nudism Today	\$2.00
	Sundial 44	\$2.00
	'69 Naked Calendar	\$2.00
	Chapagne	\$2.00
	Spread Eagle	\$5.00
	The Three Little Bares	\$5.00
	Fancy Pants	\$5.00

Exclusive	\$5.00
The Three Little Bares	\$5.00
Spread Eagle	\$5.00
Twin Pak	\$4.00
Zinger	\$4.00
Sensation	\$4.00
Twin Pak	\$4.00
1-deck playing cards-Honey brand	\$1.50
1-deck playing cards- Palygirl brand	\$1.50
2-decks playing cards- Gaiety Brand @1.50	\$3.00
1-\$5.00 bill of currency Serial #C47637359A	\$5.00
1-\$5.00 bill of currency Serial #F74735575A	\$5.00

Received by:
A. M. LEDESMA, JR.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

LOUIS L. REICHERT
who, after being duly sworn, did depose and say:

That I had been employed as a law enforcement of-
ficial for more than Twenty-Three (23 Years; that on

January 27, 1969 I had occasion to participate in an arrest of one August M. Ledesma, Jr., relative to violation of Louisiana Revised Statutes Title 14 Section 106 and St. Bernard Parish Police Jury Ordinance No. 21-60, relative to Obscenity; that on numerous occasions prior to the date of the said arrest I had had conferences with and been instructed by my employer, Sheriff John F. Rowley, concerning the obscenity of publications being displayed and sold at the Broad-Bruxelles Seafood and News Center No. 3, owned and operated by August M. Ledesma, Jr.; that I, together with Sheriff Rowley and other law enforcement officials had examined publications which had been purchased from Ledesma's establishment, and that Sheriff Rowley had instructed me in the method of determining whether or not a publication was obscene and obscene under the law, that on the night of the arrest I and Duputies George Bethea and Earl Wendling had been instructed by the Sheriff to proceed to Ledesma's establishment to examine it for violations of the law relative to obscenity; that prior to the arrest both I and Deputy Wendling had purchased books from Ledesma, all of which were obscene according to the instructions I had received from Sheriff Rowley; and, that in addition to the books purchased I and Deputy Bethea and Wendling took from defendant's establishment, approximately Forty-Five (45) other publications and playing cards which were on display to the public, and which were obviously obscene and in violation of the law; that Ledesma had in his possession approximately Three Hundred (300) or more similar publications which were not taken as evidence, and after which Ledesma retained in his possession; that I, deponent, allowed Ledesma to call his attorney,

and also to call an associate; that we three in the store, waited approximately Twenty-Five (25) minutes for the associate to come and operate the business while we took Ledesma to the parish prison to be booked; that I at no time closed down Ledesma's business operation; nor did I instruct Ledesma to close his business or dispose of any of his publications; that since the arrest on January 27, 1969, I, deponent have received evidence sufficient to charge Ledesma additionally with sales and exhibition of obscene publications to, and in the presence of, juveniles, but have not made the charges yet upon the advice of the District Attorney that I should wait until the determination by the Federal Court of the case presently pending.

(Signed) LOUIS L. REICHERT
LOUIS L. REICHERT

Sworn to and Subscribed before
me, Notary Public, at Chalmette,
Louisiana, this 21st day of
April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally came and appeared:

GEORGE BETHEA

who, after being duly sworn, did depose and say:

THAT I am a Deputy Sheriff for the Parish of St. Bernard, and as such assisted in the arrest of one August M. Ledesma, Jr. on January 27, 1969, relative to Violation of Louisiana Revised Statutes Title 14 Section 106 and St. Bernard Parish Police Jury Ordinance 21-60; that on numerous occasions prior to the arrest I had been counselled and instructed by Sheriff John F. Rowley concerning the requirements for determining the obscenity of publications; that I and the Sheriff had revised numerous publications which had been purchased from Ledesma's establishment prior to the arrest; that all of the publications which were bought and taken as evidence incidental to the arrest were visible to the public eye on the night of the arrest; that I have received evidence of sales to, and in the presence of, juveniles of obscene publications sold by Ladesma and his associates, but I have not made charges at present, upon the advice of the District Attorney pending the outcome of the suit in Federal Court; that at no time have I attempted to close down Ledesma's establishment; nor have I instructed Ledesma to dispose of any publications; that I was present during the entire occurrence of the arrest

of Ledesma and that neither Louis Reichert nor Deputy Wandling instructed Ledesma to dispose of any publications or close his business; that instead the deputies waited for approximately Twenty-Five (25) minutes for Ledesma's associate to come operate the business while Ledesma was being booked; furthermore, that I and Louis Reichert and Earl Wendling left approximately Three Hundred (300) more obscene publications in Ledesma's establishment, having taken only approximately Forty-Five (45) publications and playing cards which we felt were sufficient for the case.

(Signed) GEORGE BETHEA
GEORGE BETHEA

Sworn to and Subscribed
Before Me, Notary Public,
at Chalmette, Louisiana,
this 21st day of
April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

EARL WENDLING

who, after being duly sworn, did depose and say:

THAT I am a Deputy Sheriff for the Parish of St. Bernard, and as such assisted in the arrest of one August M. Ledesma, Jr. on January 27, 1969 relative to Violation of Louisiana Revised Statutes Title 14 Section 106 and St. Bernard Parish Police Jury Ordinance 21-60; that on numerous occasions prior to the arrest I had been counselled and instructed by Sheriff John F. Rowley concerning the requirements for determining the obscenity of publications; that I and the Sheriff had reviewed numerous publications which had been purchased from Ledesma's establishment prior to the arrest; that all of the publications which were bought and taken as evidence incidental to the arrest were visible to the public eye on the night of the arrest; that I have received evidence of sales to, and in the presence of, juveniles of obscene publications sold by Ledesma and his associates, but I have not made charges at present, upon the advice of the District Attorney pending the outcome of the suit in Federal Court; that at no time have I attempted to close down Ledesma's establishment; nor have I instructed Ledesma to dispose of any publications; that I was present during the entire occurrence of the arrest of Ledesma and that neither Louis Reichert nor George Bethea instructed Ledesma to dispose of any publications or close his business; that instead the deputies waited for approximately Twenty-Five (25) minutes for Ledesma's associate to come operate the business while Ledesma was being booked; furthermore, that I and Louis Reichert and George Bethea left approximately Three Hundred (300) more obscene publica-

tions in Ledesma's establishment, having taken only approximately Forty-Five (45) publications and playing cards which we felt were sufficient for the case.

(Signed) EARL WENDLING
EARL WENDLING

Sworn to and Subscribed
before me, Notary Public,
this 21st day of
April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

JOHN M. DARSAM
who, after being duly sworn, did depose and say:

On March 29, 1969 at approximately 10:45 A.M., I
and Herman Burkhardt, aged 16 years, entered B & B
Bookstore and walked behind a counter which is lo-
cated on your right as you enter the book store. There
is a sign which says "No one admitted under 18 years of
age." Both of us went behind the counter and looked at

several books before we picked up the two books we wanted. We each picked out one book apiece. I picked up *A Report on Teenage Prostitutes* by Russ Trainer, purchase price \$1.25 and Herman Burkhardt picked out *Sex in Eden* by A. J. Davis, purchase price \$1.25. We were in the store approximately 5 or 10 minutes when we went up to the counter to pay for the books. I gave the man a \$5.00 bill and he gave me the change. Herman had a \$10.00 bill which he handed to the man and he asked him how old he was and when Herman told him that he was 16 years old the man said that he couldn't sell him the book. Then I asked the man, "Could I purchase the book for him?" and he said "Yes", and the man picked up the \$10.00 off of the counter where Herman had put it and he gave me the change for the \$10.00. Herman picked up the bag which contained both books and walked out the store with both books. At no time while we were in the store were we ever asked to get from behind the counter or were was asked for our ages.

On April 1, 1969 at approximately 7:50 P.M. Herman Burkhardt and I again went to the B & B Bookstore. We entered the store and headed for the counter where we had purchased the books the last time. This time the man stopped us and asked for identification and he told Herman, "No, son, you are not allowed behind the counter", and I went back of the counter and picked out *Flesh for Hire* by Stacy Raymond-Taylor, purchase price \$1.25 and I walked back to the counter where Herman was standing and Herman asked me if I could buy a book for him like I did before, and the man answered, "Yes", that I could purchase one. Then Herman pointed to the book he wanted and the man

pointed to one next to it and Herman said, "No, one book to the left", and the man picked up the book and he put the book on the counter in front of Herman. The title of the book was *Passion Party* by Les King, purchase price 75¢. Herman pulled a \$10.00 bill out of his pocket and put it on the counter. The man took the \$10.00 bill and pointed to me and said, "You are purchasing this book", and he gave me Herman's change. I gave the man two \$1.00 bills for my book and the man put the books in separate bags. The man put Herman's book in a white paper bag and mine in a brown paper bag. Herman picked up both books and walked out and I walked out with Herman's change.

We both walked out of the place without any questions being asked of us.

(Signed) JOHN M. DARSAM
JOHN M. DARSAM

Sworn to and subscribed before
me, Notary Public, at Chalmette, La.
this 21st day of April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally came and appeared:

EDWARD J. MANUEL, JR.

who, after being duly sworn, did depose and say:

On Thursday, March 13, 1969 I went to the B & B Bookstore with my father, Edward J. Manuel, Sr. and I was looking around at the books and I went behind the counter and was looking at all the books with pictures about sex. This was behind the sign that said "No one under the age of 18 allowed behind this sign." I kept on reading the books. I looked at the books at least four or five minutes. A customer walked in and the man who worked in the store came and whispered in my ear that he was sorry but I would have to get from behind the counter. My father was talking to the man who was running the store. We stood in there awhile and my daddy bought some crawfish and I got two comic books.

On Thursday, March 20, 1969 I again went to the B & B Bookstore with my father and again I went behind the counter and was looking at the sex books. No one stopped me. I was back there about 3 minutes when a man in a uniform walked in and the owner made a motion with his head and hand for me to get from behind the counter. My father bought me two comic books.

On Friday, March 21, 1969 we went back to the B & B Bookstore. The old man was running the place that night, and the store was quite busy. I went back of the counter and the old man saw me, but he didn't tell me anything at that time, he kept on with his work, and approximately 7 minutes later after I read a whole page in a book called *Sex Before 20*, when the man came up to me and said, "Kid, Can't you read the damn sign? Get behind the sign, boy." This wasn't the owner of the shop, it was somebody else. My father bought crawfish and crackers that night.

On Tuesday, March 25, 1969 we went to the B & B Bookstore again. I went straight in behind the counter. I had just got there when the owner came up and tapped me on the arm and told me to get back of the sign. After I got back of the sign, my daddy started talking to the man and after the other customers left, my daddy asked me what the name of the book was that my brother wanted, and I told him I know where it is and I went back of the counter and picked up the book. I don't remember the name of the book, but it had *For Adults Only*. The owner made me put the book down and he told me to get from behind the counter. That night he had two boys and one man in the place.

On Friday, March 28, 1969 we went back to the B & B Bookstore. When we went in there was the owner and one boy about 10 years of age in the store. My daddy went to the seafood counter and I followed him, and my father ordered 2 pounds of crawfish and while they were fixing the crawfish we went back to look at the books. My father picked up a book *Lesbian Love*, by

Jeanie Quin, Adults Only, purchase price \$1.95, and he asked me if that was the book I wanted, and I told him yes and he said for me to pay for it and I took the money out of my pocket. I took \$2.00 out of my pocket and the man asked me if I had 8¢ and I looked in my pockets and I never had change so I said, "Daddy, lend me 8¢ so I can pay for the book." And he said, "Excuse me, it was 3¢ and he gave me the 5¢ back. He started to hand me the book and then he handed it to my father. My father said, "It's your book, you paid for it. You take it." Then I walked out the store with the book in my hands.

A few minutes later my father walked out and we came on home.

At the time of these occurrences I was 14 years of age.

(Signed) EDWARD J. MANUEL, JR.
EDWARD J. MANUEL, JR.

Sworn to and subscribed before
me, Notary Public, at Chalmette, La.
this 21st day of April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally came and appeared:

SHERIFF JOHN F. ROWLEY,
who, after being duly sworn, did depose and say:

That I am the duly elected Sheriff for the Parish of St. Bernard, State of Louisiana, that on January 27, 1969 Captain Louis E. Reichert and Deputies George Bethea and Earl Wendling of my office investigated the Broad-Bruxelles Seafood and News Center No. 3 at Arabi, Louisiana, relative to violations of Louisiana Revised Statutes Title 14:106 and St. Bernard Parish Police Jury Ordinance 21-60; that I am an attorney, and in my capacity as Sheriff instructed Captain Reichert and Deputies Bethea and Wendling on numerous occasions prior to the arrest, as to the legal requirements for determining obscenity of publications; that on these occasions I examined publications together with the said deputies, which publications had been purchased from Ledesma's establishment; that as Sheriff I have received numerous complaints from the citizens of St. Bernard Parish and including clergy from schools and churches within close walking distance of Ledesma's establishment, relative to the sale and distribution and exhibition of obscene publications; that Ledesma's business is still in full operation, and that although I, deponent have sufficient evidence to file additional charges against Ledesma for sale,

distribution and publication of obscene materials to, and in the presence of, minors, I have not yet done so upon the advice of the District Attorney pending the outcome of the Federal suit.

(Signed) JOHN F. ROWLEY
JOHN F. ROWLEY, SHERIFF
for the Parish of St. Bernard
Chalmette, Louisiana

Sworn to and subscribed before
me, Notary Public, this 21st
day of April, 1969.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

HERMAN R. BURKHARDT

who, after being duly sworn, did depose and say:

On March 29, 1969 at approximately 10:45 A.M., I and John Darsam, aged 21 years, entered B & B Bookstore and walked behind a counter which is located on your right as you enter the book store. There is a sign which says "No one admitted under 18 years of age." Both of us went behind the counter and looked at several books before we picked up the two books, we wanted.

We each picked out one book apiece. I picked up *Sex in Eden* by A. J. Davis, purchase price \$1.25, and John Darsam picked out *A Report on Teenage Prostitutes* by Russ Trainer, purchase price \$1.25. We were in the store approximately 5 or 10 minutes when we went up to the counter to pay for the books. John gave the man a \$5.00 bill and he gave John the change. I had a \$10.00 bill which I handed to the man and he asked me how old I was and when I told him that I was 16 years old the man said that he couldn't sell me the book. Then John asked the man, "Could I purchase the book for him?" and he said "Yes", and the man picked up the \$10.00 off of the counter where I had put it and he gave John the change for the \$10.00. I picked up the bag which contained both books and walked out the store with both books. At no time while we were in the store were we ever asked to get from behind the counter or were was asked for our ages.

On April 1, 1969 at approximately 7:50 P.M., John Darsam and I again went to the B & B Bookstore. We entered the store and headed for the counter where we had purchased the books the last time. This time the man stopped us and asked for identification and he told me, "No, son, you are not allowed behind the counter", and John went back of the counter and picked out *Flesh for Hire* by Stacy Raymond-Taylor, purchase price \$1.25 and then walked back to the counter where I was standing and I asked him if he could buy a book for me like he did before, and the man answered, "Yes", that he could purchase one. Then I pointed to the book I wanted and the man pointed to one next to it and I said, "No, one book to the left", and the man picked up the book and he put the book on the counter in front

of us. The title of the book was *Passion Party* by Les King, purchase price 75¢. I pulled a \$10.00 bill out of my pocket and put it on the counter. The man took the \$10.00 bill and pointed to John and said, "You are purchasing this book", and he gave John my change. John gave the man two \$1.00 bills for his book and the man put the books in separate bags. The man put my book in a white paper bag and John's book in a brown paper bag. I picked up both books and walked out and John walked out with my change.

We both walked out of the place without any questions being asked of us.

At the time of the occurrence I was 16 years of age.

s/ Herman R. Burkhardt
HERMAN R. BURKHARDT

Sworn to and subscribed before
me, Notary Public, at Chalmette, La.
this 21st day of April, 1969.

/s/ WALLACE P. ANSARDI
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: Jack Peebles, who, upon being duly sworn, according to law, did depose and say:

That he is an attorney at law, and on the evening of January 27, 1969 he went to the St. Bernard Parish Courthouse in Chalmette, Louisiana for the purpose of representing August M. Ledesma, Jr. regarding an arrest for obscenity made on that date;

That, while at the said courthouse, and while August M. Ledesma, Jr. was still in the custody of the St. Bernard Parish law enforcement officials, affiant heard a man who identified himself to affiant as Captain Reichart speak to August M. Ledesma, Jr. and on two occasions that evening tell August M. Ledesma, Jr. to remove the magazines which had been left in Ledesma's store from the store without delay. Affiant does not recall the exact words used except that Ledesma was told to "get rid of" the magazines and "make sure" the magazines were "not there" at some later date. There was no doubt from the statements made by Captain Reichart that, if Ledesma did not remove the magazines immediately Ledesma would be prosecuted, the magazines would be seized, or other action would be taken by Captain Reichart against Ledesma. The words of Captain Reichart were clearly a threat to Ledesma that action would be taken if the magazines were not removed.

JACK PEEBLES

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 21ST DAY
OF APRIL, 1969.

/s/ JOHN E. JACKSON, JR.
Notary Public

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: August M. Ledesma, Jr., who, upon being duly sworn, according to law, did depose and say:

That he is one of the petitioners in CA No. 69-322 in the United States District Court for the Eastern District of Louisiana;

That on the evening of January 27, 1969, immediately after the seizure of magazines and arrest of affiant as alleged in his Complaint, Captain Reichart, defendant in the above numbered action, called affiant's attention to the boxes of magazines which had been left by the police officers but which were made up principally of nudist magazines similar to the ones which were taken by the officers, and at that time Captain Reichart said:

"If I were you I would get these out of here as soon as you get back from the courthouse. You probably can send them back to the people you got them from and get your money back."

As affiant was leaving the store, while under arrest, he (affiant) spoke to an attendant at the store and told him not to sell any nudist magazines which the police officers had left. At that time Captain Reichart said to affiant: "You'd better be sure not to forget to get those out of here tonight."

That same evening, after arriving at the St. Bernard Courthouse, and in the presence of affiant's attorney, Jack Peebles, Captain Reichart again instructed affiant to be sure to take the nudist magazines out of the store as soon as affiant got back to the store. After an interval of at least fifteen minutes, and shortly before affiant was released, Captain Reichart repeated his statement to affiant to "take the magazines out of the store" as soon as affiant returned to the store.

That at the time of affiant's arrest and since that time it has been affiant's policy and the policy to the management of the Board Bruxelles Seafood and News Center to (a) refuse to sell or display to juveniles any nudist or girlie magazines of the type seized by the police officers on January 27, 1969, (b) display the said magazines only in a restricted area removed from the sight of the general public, and (c) refuse any lurid advertising of the said magazines. In furtherance of this policy signs restricting the display area of these magazines were kept in the store at all times and

minors were forbidden to go into the area prohibited by the signs. The attached photographs numbered "Ledesma 1" and Ledesma 2" are photographs taken two days after the aforementioned raid and arrest, and the photographs accurately represent the display of magazines in the aforementioned store at the time of affiant's arrest and since that time. Photograph "Ledesma 1" represents a view of the inside of the store to a customer as the customer enters from the front entrance to the store, and shows that no girlie or nudist magazines of the aforementioned type can be seen by the general public trading in the said store. Photograph "Ledesma 2" shows the entrance to the area restricted to persons over the age of eighteen years. The magazines and publications seized by the police on January 27, 1969 were displayed in the restricted area on the rack appearing in the right foreground of "Ledesma 2", so that no general customer could view the said publications without going into the restricted area.

(Signed) AUGUST M. LEDESMA, JR.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 21ST DAY
OF APRIL, 1969.

/s/ JOHN E. JACKSON, JR.
Notary Public

STIPULATION

It is agreed and stipulated among the parties that there were two photographs attached to the original affidavits duly entered in evidence in this matter, which photographs depict the views described in the attached affidavit. These photographs are now missing and cannot be duplicated. Diligent efforts to locate the photographs have been unsuccessful.

New Orleans, Louisiana, this 6th day of November, 1969.

(Signed) JACK PEEBLES
JACK PEEBLES,
Attorney for Plaintiffs

(Signed) CHARLES LIVAUDAIS
CHARLES LIVAUDAIS,
Attorney for Defendants

ANSWER ON BEHALF OF LEANDER H. PEREZ, JR.

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Apr. 21, 1969

Now into Court comes Leander H. Perez, Jr., made defendant herein, and for answer to the complaint of the petitioners avers that:

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction in that the amount of the civil matter does not exceed the Statutory requirements.

THIRD DEFENSE

Defendant answers the complaint as follows:

1.

Defendant admits that plaintiffs are the owners of

a newsstand in the Parish of St. Bernard, State of Louisiana, named the Broad-Bruxelles Seafood and News Center No. 3, but otherwise denies all allegations of Paragraph 1 of the Petition for want of sufficient information to justify a belief.

2.

Defendant admits the names and status as outlined in Paragraph 2 of the Petition.

3.

Paragraph 3 of the complaint is denied.

4.

Paragraph 4 of the complaint is denied.

5.

Paragraph 5 of the complaint is denied.

6.

Defendant denies Paragraph 6 of the complaint except to admit the defendants were acting under a valid Statute of the State of Louisiana and the Parish of S. Bernard in the regular performance of their duty.

7.

Defendant admits that plaintiff, August M. Ledesma,

Jr. was arrested in violation of the State Statutes as enumerated, and admits that certain items were taken as evidence from the establishment incidental to the arrest, but otherwise denies all other allegations of Paragraph 7 of the complaint.

8.

Defendant admits that plaintiffs Ledesma is being prosecuted for the above-mentioned violations of the law, but denies all other allegations of Article 8 of the complaint.

9.

Defendants admits that certain publications were taken as evidence incidental to the arrest, and deny the remainder of Paragraph 9.

10.

Paragraph 10 of the complaint, is denied, defendant further stating that search warrant was not required under these circumstances.

11.

Paragraph 11 of the complaint is denied.

12.

Paragraph 12 of the complaint is denied.

78

13.

Paragraph 13 of the complaint is denied.

14.

Paragraph 14 of the complaint is denied.

15.

Paragraph 15 of the complaint is denied for want of sufficient information to justify a belief.

16.

Paragraph 16 of the complaint is denied.

17.

Paragraph 17 of the complaint is denied.

18.

Paragraph 18 of the complaint is denied.

19.

Defendant admits that the actions were in good faith under valid State Statutes, and deny remainder of Paragraph 19 of the complaint.

79

20.

Paragraph 20 of the complaint is denied.

21.

Paragraph 21 of the complaint is a legal conclusion and requires no answer.

22.

Paragraph 22 of the complaint is denied.

23.

Paragraph 23 of the complaint is denied.

24.

Paragraph 24 of the complaint is denied.

25.

Paragraph 25 requests admissions of public records and said public records are the best evidence of themselves.

26.

Paragraph 26 of the complaint is denied.

27.

Paragraph 27 of the complaint is denied.

28.

Paragraph 28 of the complaint is denied.

FOURTH DEFENSE

Defendant avers that all actions by defendants have been performed in good faith under valid state law, which is constitutional.

WHEREFORE, defendant demands judgment in his favor and in favor of all defendants, and against plaintiffs, rejecting plaintiff's claims, with costs.

Respectfully submitted,

LEANDER H. PEREZ, JR.
DISTRICT ATTORNEY

CHARLES H. LIVAUDAIS
ASSISTANT DISTRICT
ATTORNEY

/s/ CHARLES H. LIVAUDAIS

(Certificate of Service omitted)

EXHIBITS

(Title omitted in printing)

Date	Id. No.	Description
1969	P-1	Peebles affidavit
4-21	P-2	Ledesma affidavit
	P-3	St. Bernard Ordinance 21-69
	P-4	Bill of Info. 17-086
	P-5	Bill of Info. 17-085
	P-6	Bill of Info. 17-087
	P-7	Bill of Info. 17-088
	P-8	3 unreported opinions 6051 E. District of Va 67-C-450 Dist. S. Indiana 68-1392 S. Florida

The following exhibit offered by Jefferson Parish identified as 9.

Bills of Information
 Jefferson Parish (note attachment in Brown manila envelope
 Nos. 113050
 113051
 113052
 113053
 113054

	P-9	Transcript of hearing Motion to Suppress Jefferson Parish Nos. 113050 113051 113052 113053 113054
Ledesma v.		
Perez	D-1	Affidavit Reichart
	D-2	Affidavit Bethea
	D-3	Affidavit Wendling
	D-4	Affidavit Darsam
	D-5	Affidavit Manuel
	D-6	Affidavit Rowley
	D-7	Box of Magazine and Playing Cards
Stipulation		
Of Facts	69-322	
ditto	68-1927	

United States District Court
Eastern District of Louisiana
New Orleans Division

versus NO. 68-1927
CIVIL ACTION
SECTION D

August M. Ledesma, Jr., Et Al

versus NO. 69-322
CIVIL ACTION
SECTION D

Jack Peebles, Esq.
Attorney for Plaintiffs

A. W. Wambsgans, Esq.
James F. Quaid, Esq.
Charles H. Livaudais, Esq.
Attorneys for Defendants

Before WISDOM, Circuit Judge, and BOYLE and RUBIN, District Judges.

BOYLE, District Judge:

These actions arise from the arrest by the defendant law enforcement officers in Jefferson¹ and St. Bernard² Parishes, Louisiana, of the individual plaintiffs and the incidental seizures of quantities of publications claimed to be obscene.

Those plaintiffs, residents of the Parishes of Orleans and Jefferson, are the owners and operators of newsstands in both Parishes. The corporate plaintiff, Delta Book Distributors, Inc., is a New York corporation engaged in the business of distributing books and magazines to newsstands, including those of the individual plaintiffs.

Jurisdiction is asserted and exists under 28 U.S.C. 1331, 1343, 2201 and 2281 and 42 U.S.C. 1983.

The facts in both cases are substantially parallel. In both, the arrests and seizures were made without warrants and without prior adversary judicial hearing on or determination of the claimed obscene character of the seized materials. In both, publications similar to those seized were purchased by the enforcement officers³ prior to the arrests.

¹In Delta Book, the defendant Cronvich is Sheriff of Jefferson Parish, the defendants Lightell, Lemoine and Frisch are his deputies and the defendant Letini is Marshal of the Town of Kenner, Jefferson Parish.

²In Ledesma, the defendant Perez is District Attorney and the defendants Rechart, Wendling and Bethea are Deputy Sheriffs of the Parish of St. Bernard.

³Three by the Jefferson Parish officers and four by their St. Bernard Parish counterparts.

Following their arrests two-count bills of information were filed against the individual plaintiffs in the Delta Book case⁴ and against only one of the plaintiffs in the Ledesma case, namely, August M. Ledesma, Jr.,⁵ charging violations of the Louisiana obscenity statute. Additionally, Ledesma was charged in two bills⁶ with violations of the St. Bernard Parish obscenity ordinance,⁷ which, prior to the hearing herein, had been nolle prosecuted.

The charges⁸ filed against Ledesma in St. Bernard Parish were laid under Louisiana Revised Statutes,

⁴The prosecutions instituted in the 24th Judicial District Court for the Parish of Jefferson are styled and numbered as follows: State of Louisiana v. Fernin J. Farrell, No. 113-050; Ronald J. Walker, No. 113-051; Ronald J. Walker and Charles Rhody, No. 113-052; Lawrence P. Pittman, Jr., Harold J. Spiess, Jr. and August M. Ledesma, Jr., No. 113-053; Lawrence P. Pittman, Jr., No. 113-054.

⁵State of Louisiana v. August M. Ledesma, Jr., Nos. 17-085 and 17-086 of the docket of the 25th Judicial District Court for the Parish of St. Bernard.

⁶State of Louisiana v. August M. Ledesma, Jr., Nos. 17-087 and 17-088, 25th Judicial District Court for the Parish of St. Bernard.

⁷No. 21-60.

⁸In case No. 17-085, it is charged that Ledesma, on January 27, 1969, "did produce, sell, exhibit, give or advertise with the intent to primarily appeal to the prurient interest of the average person, lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture drawing, motion film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character * * *" in violation of R.S. 14:106(2).

In case No. 17-086, it is charged that Ledesma "did possess" rather than "did produce" the objects described [in the information in No. 17-085] in violation of R.S. 14:106(3).

Title 14, Section 106 A(2) and A(3).⁹ Those¹⁰ against the Delta Book plaintiffs in Jefferson Parish are brought under the same subsections of the Louisiana statute in addition to subsection A(7).¹¹

Unlike the St. Bernard Parish officers, who seized forty-five publications and a deck of playing cards, while leaving more than three hundred similar publications, the Jefferson Parish officers seized all copies of the alleged offending publications, including multiple copies of some, which could be found on the premises.¹²

In both cases, the Federal constitutional issues raised herein were presented to the respective State Trial Courts in Motions to Quash the bills of information and to Suppress the seized evidence and were decided adversely to the plaintiffs herein.

⁹See Footnote 23.

¹⁰The bills of information are identical as to all plaintiffs (see Footnote 4) except as to the dates on which and places at which the offenses are alleged to have occurred, and in substance charge that the respective plaintiffs did " * * * wilfully and intentionally exhibit and possess with intent to display, advertise and/or sell lewd, lascivious and/or sexually indecent magazines * * * " (Count 1) and did " * * * wilfully and intentionally exhibit and possess with the intent to display, advertise and/or sell lewd, lascivious and/or sexually indecent magazines and/or books * * * to the general public and/or particularly in the presence of unmarried persons under the age of 17 years * * * " (Count 2) in violation of Sections 2, 3 & 7, R.S. 14:106.

¹¹See Footnote 23.

¹²From the Expressway News Center, 56 magazines were seized on August 23, 1968; from the Veterans Newstand, 200 and 296 books and magazines were seized on September 6 and October 18, 1968, respectively; and from the Broad Bruxelles Seafood & News Center, 138 and 62 books and magazines were seized on October 3 and 18, 1968, respectively.

In view of the result we reach, it is unnecessary in either case to consider whether the seized publications are in fact obscene.¹³

The principal relief prayed for in each case is identical,¹⁴ viz, a declaratory judgment decreeing the Louisiana statute unconstitutional (a) on its face and (b) as applied to the plaintiffs; preliminary and permanent injunctions enjoining the defendants¹⁵ (a) from prosecuting the plaintiffs under the pending charges, (b) from prosecuting them for violation of the statute in the future and (c) from seizing materials in the future (1) without a prior adversary judicial proceeding and (2) without a warrant; the return of the seized materials and damages.

We have for decision all issues, except the issue of damages which was severed and reserved for the single Judge Court.

¹³In the Delta Book case, the parties stipulated, though subject to the plaintiffs' objection of irrelevancy, that if called as witnesses "men and women from different income levels and various ages, law enforcement personnel, professors, school teachers, ministers, priests and rabbis would testify that in their opinion all of the aforementioned books and magazines are: (a) obscene, in the case of witnesses called by the defendants, and (b) not obscene, in the case of said witnesses called by the plaintiffs."

Also in the Delta Book case, "samples" of the seized publications were received in evidence subject to plaintiffs' objection of irrelevancy.

In the Ledesma case, all of the seized materials were received in evidence subject also to the plaintiffs' objection of irrelevancy.

¹⁴In the Ledesma case, the plaintiffs also seek to have the St. Bernard Parish obscenity ordinance declared unconstitutional.

¹⁵In Delta Book, the District Attorney for the Parish of Jefferson is not a party defendant. In Ledesma, the District Attorney for the Parish of St. Bernard is a defendant.

The guarantee of freedom of speech embodied in the First Amendment to the United States Constitution does not extend to obscenity. *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). Consequently, obscene utterances and materials, properly defined, may be the subject of Federal and State regulation or suppression. However, since "constitutionally protected expression ... is often separated from obscenity only by a dim and uncertain line,"¹⁶ any attempt, be it Federal or State, to regulate or suppress allegedly obscene material must be closely scrutinized to the end that protected expression is not abridged in the process. Accordingly, "the Constitution requires a procedure 'designed to focus searchingly on the question of obscenity' before speech can be regulated or suppressed. *Marcus v. Search Warrants*, 367 U.S. 717, 732, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127," and "[t]he dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211, 84 S. Ct. 1723, 12 L. Ed. 2d 809; *Metzger v. Percy*, 7 Cir., 393 F. 2d 202, 204; *United States v. Brown*, S.D. N.Y., 274 F. Supp. 561; *Cambist Films, Inc. v. Illinois*, N.D. Ill., Eastern Div., 292 F. Supp. 185, decided October 21, 1968."¹⁷

Since prior restraint upon the exercise of First

¹⁶*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963).

¹⁷*Cambist Films, Inc. v. Tribell*, 293 F. Supp. 407 (E.D. Ky. 1968).

Amendment rights can be exerted through seizure¹⁸ (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizures and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.¹⁹

We are mindful of the fact that even attempts to regulate obscenity incorporating procedures for affording the required adversary hearing would themselves constitute prior restraints.²⁰ For example, it might be argued that the expense of legal representation at such hearings, the apprehension as to whether or not the allegedly obscene materials should continue to be sold pending the outcome of the hearing and so forth would serve to "chill"²¹ First Amendment rights. We can readily conceive, therefore, that much litigation would be spawned by the adoption of adversary hearing procedures. Nonetheless, it is apparent that there must be some permissible prior restraint, be it however subtle, if obscenity is not protected by the First A-

¹⁸As *Cambist Films, Inc. v. Tribell*, footnote 3, *supra*, makes clear, the principles announced in such cases as *A Quantity of Books*, *supra*, with respect to searches and seizures in civil forfeiture cases apply with equal, if not greater, force in cases involving searches and seizures incident to criminal prosecutions.

¹⁹*Poulos v. Rucker*, 288 F. Supp. 305 (M.D. Ala. 1968).

²⁰"Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene..." *Smith v. People*, 361 U.S. 147, 154-155, 80 S. Ct. 215, 219, 4 L. Ed. 2d 205 (1960).

²¹*Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

ment and State attempts to regulate it are to be enforceable. It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the enforcement of any such regulations. However, these procedures, among others, may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity.

Applying these principles to the cases before us, the arrests, as well as the seizures claimed to be incident thereto, are clearly invalid for lack of a prior adversary determination of the obscenity of the materials upon which the arrests and seizures were based. The fact that in each case some materials were purchased rather than seized is of no moment in view of the requirement of an adversary determination of obscenity prior to arrest or threat of arrest.²²

We turn now to the specific relief prayed for in each of the suits.

Initially, we are asked to declare the Louisiana Obscenity Statute²³ unconstitutional on its face and as applied. This same relief is sought with respect to the St. Bernard Parish Obscenity Ordinance.²⁴ Since the Louisiana statute is composed of three lettered para-

²²Of course, the defendant cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto has passed.

²³La. R.S. 14:106. See Appendix A.

²⁴Ordinance #21-60 of the Parish of St. Bernard. See Appendix B.

graphs, with Paragraph "A", defining obscenity, being further subdivided into seven subparts each of which delineates a separate offense, we address ourselves solely to those subsections under which any plaintiff was charged in either of the cases.²⁵ The subsections of Paragraph "A" with which we are concerned are "(2)", "(3)" and "(7)".

The plaintiffs contend that the statute is unconstitutional on its face because it defines obscenity too broadly, affords no ascertainable standard of guilt, and lacks the required element of scienter.

We are aware of the United States Supreme Court's per curiam reversal in *Henry v. Louisiana*, 392 U.S. 655, 88 S. Ct. 2274, 20 L. Ed. 2d 1343 (1967), citing only *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967), also a per curiam opinion. In view of the fact that the decision of the Louisiana Supreme Court in *Henry* (reported at 198 So. 2d 889) not only

²⁵This Court declines to render a declaratory judgment concerning the constitutionality vel non of the entire statute in view of the fact that as to those sections or subsections under which plaintiffs have not been charged there is no "actual controversy" as required by 28 U.S.C. §2201. Although "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief" *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967) and abstention has been disapproved in cases involving First Amendment rights, nonetheless, the Supreme Court in *Zwickler* in footnotes 3 and 15 recognized that before declaratory relief is proper the usual prerequisites therefor must be established. Accordingly, as to those sections under which plaintiffs have not been charged, the prayer for declaratory relief comes prematurely in that there is neither "substantial controversy" nor "sufficient immediacy." See *Machesky v. Bizzell*, 5 Cir., 1969, ____ F. 2d ____ [No. 26832, May 5, 1969].

upheld the constitutionality of La. R.S. 14:106 §A(2) and (3) as not being violative of freedom of speech or vague, but, in addition, erroneously²⁶ construed the term "contemporary community standards" to embody a purely local, rather than national, norm, we cannot conclude from the per curiam opinion that the Supreme Court of the United States passed upon the constitutionality of La. R.S. 14:106.

A study of subsections "(2)" and "(3)" convinces us that neither subsection is unconstitutional on its face. Subsection "(3)" incorporates the standards of obscenity contained in subsection "(2)". We find that these subsections define obscenity in terms substantially similar to those approved in *Roth v. United States*, supra, in that expression regulated by the statute is that intended "to primarily appeal to the prurient interest of the average person." As was the court in *Cambist Films, Inc. v. Tribell*, supra, we are aware of the language of Mr. Justice Brennan in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966) to the effect that material may not be legally adjudged obscene unless it meets each of the following three tests: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." And, we con-

²⁶*Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

cur in the statement of the Court in *Tribell*, supra, that "[i]n listing these three elements, Mr. Justice Brennan was not making *additional* requirements, but was merely explaining the *Roth* test." Therefore, we find that subsections (2) and (3) of Paragraph A of La. R.S. 106, while not explicitly inclusive of the tripartite test enunciated by Mr. Justice Brennan, do, if judicially interpreted and applied in light thereof, satisfy constitutional requirements.

Plaintiffs' charge that the statute is vague is without merit in so far as subsections (2) and (3) are concerned. The definition of obscenity through the aid of adjectives such as "lewd," "lascivious" and "filthy" and the adjectival phrase "sexually indecent" embodies an ascertainable standard of guilt when these terms are taken to have their commonly accepted meanings. Furthermore, if the term "obscene" is itself not unconstitutionally vague,²⁷ a fortiori, the term "obscenity" explained by the adjectives used in these subsections is not vague.

Finally, plaintiffs' attack upon the statute for lack of the required element of "scienter" is without merit. The use of the word "intentional" and the phrase "with the intent" in the statute satisfy the requirements for "scienter" set forth in *Smith v. People*, supra. Indeed, we concur in the following statement of the Supreme Court of Louisiana in *State v. Roufa*, 241 La. 474, 129 So. 2d 743 (1961): "We conclude that the word 'Intentional' and the phrase 'With Intention' (sic) in the

²⁷*Mishkin v. State of New York*, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966).

Louisiana Obscenity Statute mean that knowledge is implied where one has criminal intent. It leaps to the mind that knowledge is necessary to intention and that one cannot have intention without knowledge. We find that Paragraph Two of LSA-R.S. 14:106 meets the requirements laid down in the Smith case" (Citations and footnote reference omitted.)

Subsection "(7)" of Paragraph A is unconstitutional on its face as plaintiffs contend. A simple reading of this subsection reveals that by its terms it is overbroad.²⁸ A literal application thereof would, for example, make it a criminal offense to display, for any purposes, universally accepted anatomical works or recognized works of art or the like anywhere but "in art galleries." Such a limitation is patently unconstitutional.

We, here, note that the fact that subsection "(7)" of Paragraph A of the statute is unconstitutional, is not fatal to the entire statute in light of the severability clause found in Section 2 of Act 647 of 1968.²⁹

We find a total lack of evidence to support the conten-

²⁸"The portrayal of sex, e.g. in art, literature and scientific works, is not itself sufficient reason to deny the material the constitutional protection of freedom of speech and press." *Roth v. United States*, supra.

²⁹La. R.S. 14:106 would appear to be severable even in the absence of a severability clause in view of the fact that each subpart of Paragraph A delineates a separate and independent offense. The act would, with clarity, state an offense notwithstanding total deletion of subpart "(7)" of Paragraph A. For a comprehensive discussion of the factors to be considered in determining severability see *Statutes and Statutory Construction*, Sutherland, Vol. 2, Sections 2401 et seq.

tion that La. R.S. 14:106 is unconstitutional as applied to the plaintiffs.³⁰ To the extent that this contention is based upon the lack of the required procedural safeguards prior to seizure or arrest, it has been disposed of by what we have hereinabove held with respect to the necessity of an adversary judicial determination of obscenity.

The plaintiffs in the case arising from St. Bernard Parish were charged under the St. Bernard Obscenity Ordinance as well as under the State statute. Subsequently, but prior to the hearing in this court, the charges under the ordinance were nolle prosequied. However, we are asked to pass on the constitutionality of this ordinance for the reason that plaintiffs fear prosecution thereunder at some future date.³¹ Accordingly, in order to grant complete relief, we have examined the ordinance and find it to be unconstitutional

³⁰We make no finding, however, as to whether the allegedly obscene materials here are protected by the First Amendment, and whether, therefore, the statute would be unconstitutional as applied to them. That question requires the application of the constitutional standard of obscenity to the seized printed matter. We leave the determination to be made in the first instance by the state court after the adversary hearing which we today hold necessary.

³¹Although it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance, as distinguished from statutes of state-wide application, *Moody v. Flowers*, 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967), the court takes this opportunity to express its views on the constitutionality of the ordinance in the interest of judicial economy. The view expressed by this court concerning the constitutionality of the ordinance is shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith.

and unenforceable. The ordinance is poorly drafted and in some respects may be unintelligible and, therefore, is mortally infected with the vice of vagueness. Additionally, the ordinance is too broad, in that it seeks to regulate material protected by the First Amendment as interpreted by recent judicial decisions.

Assuming that this ordinance was constitutional or that a constitutional replacement therefor was enacted, local authorities in the enforcement thereof would be bound by the same requirement of an adversary hearing as State authorities are with respect to the enforcement of State statutes.

Plaintiffs seek to enjoin the defendants from proceeding with the prosecutions pending against them, as well as from instituting any new prosecutions and undertaking any further seizures or arrests. We decline to grant any injunctive relief in either of the cases before us.

In view of our holding that the arrests and seizures in these cases are invalid for want of a prior adversary judicial determination of obscenity, which holding requires suppression and return of the seized materials,³²

³²*Chimel v. State of California*, decided by the Supreme Court of the United States on June 23, 1969, 37 L.W. 4613, limits the area in which a search may be made incidental to a lawful arrest. We need not be concerned with whether *Chimel* applies to searches and seizures occurring before June 23, 1969. In the light of the absence of any direct controlling expression in *Chimel* and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L. Ed. 2d 1199 (1967); *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed. 2d 601 (1965); *Fuller v. Alaska*, 393 U.S. 80, 89 S. Ct. 61, 21 L. Ed. 2d 212 (1968), and *Desist v.*

the prosecutions should be effectively terminated. We have no reason to question that the defendant law officers and prosecuting attorneys of both Parishes will, in good faith, abide by our rulings herein as to pending or future prosecutions or future arrests and seizures. Doing so will make it unnecessary to issue any injunctions with respect to either, whether under the State statute or the St. Bernard Parish ordinance.³³ However, we retain jurisdiction for the purposes of hereafter entering any orders necessary to enforce the views expressed herein.

Accordingly, for the reasons assigned, IT IS ORDERED that judgment in both cases be entered decreeing:

1. That all seized materials be returned, instanter, to those from whom they were seized,
2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,
3. That the preliminary and permanent injunctions prayed for be denied, and
4. That jurisdiction be retained herein for the is-

U.S., 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969), it would appear that the limiting effect of *Chimel* would not be held retrospectively applicable. However, even assuming the contrary, in view of our holding that the lack of a prior adversary hearing taints the warrantless arrests involved here, the searches, whether confined to the limits set by *Chimel* or not, and the resultant seizures would fall by reason of the unlawful arrests incidental to which the defendants urge they acted in seizing the materials.

³³See Footnote 29, *supra*.

suance of such further orders as may be necessary and proper.

New Orleans, Louisiana, July 14th, 1969.

/s/ JOHN MINOR WISDOM
UNITED STATES
CIRCUIT JUDGE

/s/ EDW. J. BOYLE, SR.
UNITED STATES
DISTRICT JUDGE

RUBIN, J., dissents in part and will file written reasons.

For the reasons assigned in the foregoing 3-Judge Court opinion, IT IS ORDERED that judgment be entered herein decreeing:

1. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional.

2. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper.

New Orleans, Louisiana, July 14th, 1969.

/s/ Edw. J. Boyle, Sr.
UNITED STATES
DISTRICT JUDGE

APPENDIX "A"

§ 106. Obscenity

A. Obscenity is the intentional:

(1) Exposure of one's person in a public place in such manner that any part of a sex organ may be seen by another person, with the intent of arousing sexual desire.

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) Performance by any person or persons in the presence of another person or persons with the intent of arousing sexual desire, of any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement.

(5) Solicitation or attempt to entice any unmarried person under the age of seventeen years to commit any act prohibited by this section.

(6) Requirement by a person, as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication to a purchaser or consignee, that such purchaser or consignee receive for resale any other article, book or publication reasonably believed by such purchaser or consignee to contain articles or material of any kind or description which are designed, intended or reasonably calculated to or which do in fact appeal to the prurient interests of the average person in the community, as judged by contemporary community standards, or the denying or threatening to deny any franchise or to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles or things or by reason of the return thereof.

(7) Display of nude pictures of a man, woman, boy or girl in any public place, except as works of art exhibited in art galleries.

B. In prosecutions for obscenity, lack of knowledge of age or marital status shall not constitute a defense.

C. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both.

When a violation of Paragraphs (1), (2), (3), and (4) of Subsection (A) of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than one thousand dollars, or imprisoned for not more than five years with or without hard labor, or both.

Amended by Acts 1958, No. 388, § 1; Acts 1960, No. 199, § 1; Acts 1962, No. 87, § 1; Acts 1968, No. 647, § 1, emerg. eff. July 20, 1968, at 1:30 P.M.

APPENDIX "B"

Police Jury
ST. BERNARD PARISH
St. Bernard Courthouse Annex
Chalmette, Louisiana

EXTRACT OF THE OFFICIAL PROCEEDINGS OF
THE POLICE JURY OF THE PARISH OF ST. BERNARD,
STATE OF LOUISIANA, TAKEN AT THE
REGULAR MEETING HELD IN THE POLICE JURY
ROOM OF THE COURTHOUSE ANNEX, AT CHALMETTE,
LOUISIANA, ON NOVEMBER 2, 1960, AT
ELEVEN O'CLOCK (11:00) A. M.

On motion of Celestine Melerine, seconded by Joseph
V. Papania and upon recommendation of the District
Attorney of the Parish of St. Bernard, the following
Ordinance was adopted:

ORDINANCE #21-60

An Ordinance known as the Ordinance of St.
Bernard Parish, relative to prohibiting and
defining the offense of obscenity and indecent
literature, adding thereto the offense of "at-
tempt", and prescribing penalties for the vio-
lation thereof.

SECTION 1.

Offense of obscenity defined and prohibited.

SECTION 2.

BE IT ORDAINED, by the Police Jury of the Parish

of St. Bernard that obscenity is prohibited and is hereby defined as the intentional.

SECTION 3.

BE IT FURTHER ORDAINED, that public personal exposure of the female breast or the sexual organs or fundament of any person of either sex.

SECTION 4.

BE IT FURTHER ORDAINED, that production, sale, exhibition, possession with intent to display, or distribution of any obscene, lewd, lascivious, prurient or sexually indecent print, advertisement, picture, photograph, written or printed composition, model, statue, instrument, motion picture, drawing, phonograph recording, tape or wire recording, or device or material of any kind.

SECTION 5 (a)

BE IT FURTHER ORDAINED that the performance of any dance, song, or act in any public place, or in any public manner representing or portraying or reasonable calculated to represent or portray any act of sexual intercourse between male and female persons, or any act of perverse sexual intercourse or contact, or unnatural carnal copulation, between persons of any sex, or between persons and animals.

SECTION 5 (b)

OR FURTHER, the performance in any public place, or any public manner of any obscene, lewd, lustful, lascivious, prurient or sexually indecent dance, or the rendition of any obscene, lewd, lustful, lascivious, prurient or sexually indecent song or recitation.

SECTION 6.

BE IT FURTHER ORDAINED, PRODUCTION, POSSESSION WITH INTENT to display, exhibition, distribution, or sale of any literature as defined herein containing one or more pictures of nude or semi-nude female persons, wherein the female breast or any sexual organ is shown or exhibited, and where, because of the number or manner of portrayal in which such pictures are displayed in such literature, they are designed to appeal predominantly to the prurient interest.

SECTION 7. BE IT FURTHER ORDAINED, that it shall also be unlawful for any person to attempt to commit any of the violations set forth in this section.

SECTION 8. BE IT FURTHER ORDAINED, that any person upon conviction of a violation of this section shall be sentenced to serve not more than ninety (90) days, or pay a fine of not more than one hundred dollars (\$100.00) or both, in the discretion of the Court.

BE IT FURTHER ORDAINED, that persons convicted of an attempt to violate this section shall be sentenced to not more than one-half of the maximum penalty prescribed, or pay not more than half of the maximum fine or both, as set forth above.

SECTION 9. BE IT FURTHER ORDAINED, that the word literature as used herein means and includes a book, booklet, pamphlet, leaflet, brochure, circular, folder, handbill or magazine. The word picture as used herein means and includes any photograph, lithograph,

drawing, sketch, abstract, poster, painting, figure, image, silhouette, representation or facsimile.

SECTION 10. BE IT FURTHER ORDAINED, that this Ordinance shall be published in the Official Journal of the Parish, the St. Bernard Voice.

This Ordinance having been submitted to a vote, the vote thereon was as follows:

YEAS: Henry C. Schindler, Jr., Joseph V. Papania, Peter N. Huff, Peter Perniciaro, Louis P. Munster, John W. Booth, Sr., Claude S. Mumphrey, Celestine Melrine, Edward L. Jeanfreau, and Mrs. Blanche Molero.

NAYS: None

ABSENT: None

And the Ordinance was declared adopted on this, the 2nd day of November, 1960.

/s/ Joseph E. Sorci
JOSEPH E. SORCI
SECRETARY

/s/ Valentine Riess
VALENTINE RIESS
PRESIDENT

CERTIFICATE

I CERTIFY THAT the above and foregoing is a true and correct copy of an ordinance adopted by the St. Bernard Parish Policy Jury at a Regular meeting held at Chalmette, Louisiana, in the Police Jury Room at the Courthouse Annex on the 2nd day of November, 1960.

Witness my hand and the Seal of the St. Bernard
Parish Police Jury this 11th day of February, 1969.

/s/ R. M. McDOUGALL
R. M. McDOUGALL
SECRETARY

JUDGMENT

Filed: Aug. 13, 1969

United States District Court
Eastern District of Louisiana
New Orleans Division

August M. Ledesma, Jr. Harold J. Speiss, and Law-
rence P. Pittman

versus

NO. 69-322
CIVIL ACTION
SECTION D

Leander H. Perez, Jr., Individually and as District
Attorney For the Twenty-Fifth Judicial District, State of
Louisiana;

Louis Reichart, Individually and as Captain in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana;

George Bethea, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana; and

Earl Wendling, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana

For the written reasons of the Court on file herein, and considering the direction of the Court as to the entry of judgment;

IT IS ORDERED AND ADJUDGED that there be judgment decreeing:

1. That all seized materials be returned, instanter, by the defendants to those plaintiffs from whom they were seized,

2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,

3. That the preliminary and permanent injunctions prayed for be denied,

4. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional, and

5. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper.

New Orleans, Louisiana, this 13th day of August 1969.

(Signed) A. DALLAM O'BRIEN, JR.
A. DALLAM O'BRIEN, JR.,
CLERK

APPROVED AS TO FORM:

/s/ EDW. J. BOYLE, SR.

UNITED STATES DISTRICT JUDGE

Jack Peebles, Esq.
A. W. Wambsgans, Esq.
Robert I. Broussard, Esq.
Charles Livaudais, Esq.
Leander Perez, Jr., Esq.

OPINION

Filed: Sep. 3, 1969

United States District Court
Eastern District of Louisiana
New Orleans Division

Delta Book Distributors, Inc., et al,
Plaintiffs,

versus

CIVIL ACTION
NO. 68-1927
SECTION "D"

Alwynn J. Cronvich, Etc., et al,
Defendants,
August M. Ledesma, Jr., et al,
Plaintiffs,

versus

CIVIL ACTION
NO. 69-322
SECTION "D"

Leander H. Perez, Jr., Etc., et al,
Defendants.

Jack Peebles, Esq.

Attorney for Plaintiffs

A. W. Wambsgans, Esq.

Attorney for Defendants

James F. Quaid, Esq.

Attorney for Defendants

Charles H. Livaudais, Esq.

Attorney for Defendants

RUBIN, District Judge, dissenting:

I respectfully dissent from that portion of the decision that holds it unconstitutional for the state to arrest a defendant on a charge of violating a valid statute punishing the crime of selling pornographic literature, and from the suggestion that, to be constitutional, a state statute "may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity."

My brothers and I agree that we are bound by the principal "that obscenity is not withing the area of constitutionally protected speech or press." *Roth v. United States*, 1957, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309. Adhering, as we must, to the repeated decisions of a majority of the Supreme Court, we unanimously reject the dissenting view of Justices Black and Douglas that both federal and state governments are "without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind" *Ginzburg v. United States*, 1966, 383 U.S. 463, 475, 86 S.Ct. 942, 950.

But the majority of this court suggests that, in order to exercise its constitutional power, the state must adopt a procedure unprecedented in criminal law and incapable of effective enforcement. For, if their view is correct, no prosecution could be commenced under this statute that we all agree is constitutional unless the state first holds a separate adversary proceeding against every single news dealer for each item of pornography that he might choose to see at any time. Even though a court might have decided that a dealer on one street was violating the law by selling a work that had been held pornographic, a dealer on the next street could not be prosecuted until he also had been afforded a "prior adversary hearing" concerning the self-same item. And after it had been determined that the current issue of "Spread Eagle," consisting of photographs proclaimed to be for "Adults Only" (State Exhibit 7), violated the statute, the defendant would be free (by simply substituting one model for another) to sell another issue of that prurient publication containing photographs having identical pornographic content.

The Constitution forbids a statute that would punish a dealer for innocently selling pornographic material. The statute must require knowledge — "scienter." *Smith v. California*, 1959, 361 U.S. 147, 80 S.Ct. 215. But, if a statute does so, the evidence is sufficient to justify conviction if it shows the defendant to be "aware of the character of the material" and his action to be "not innocent but calculated purveyance of filth." *Mishkin v. New York*, 1966, 383 U.S. at 512, 86 S.Ct. at 965. Since we unanimously conclude that "scienter"

is a requirement of the Louisiana statute, constitutional requisites are fully satisfied.

"In considering searches incident to arrest, it must be remembered," Justice White said in his dissent in *Chimel v. California*, 1969, ____ U.S. ____, ____, 89 S.Ct. 2034, 2050-2051, "that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search ... and having been arrested, he will soon be brought into contact with people who can explain his rights.... An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding."

That in my view is all that the state is required to do. It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite;¹ there should be no rule in criminal law — even by virtue of the protection accorded to freedom of speech — that every peddler of pornography is entitled to one free essay at scatology.

Never has the Supreme Court intimated such a requirement. It gave no hint of it when, without exacting any adversary hearing prior to prosecution, it upheld the conviction of a defendant under a New York statute for a sale of obscene materials to minors, in *Ginsberg v. New York*, 1968, 390 U.S. 629, 88 S.Ct. 1274, or when

¹See Prosser on Torts, 516 (3d ed. 1964).

it upheld another conviction under the New York statute for "hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them." *Mishkin v. New York*, 1966, 383 U.S. 502, 86 S.Ct. 958. It is obviously impossible to hold a "prior adversary hearing" with respect to the offense of hiring someone to prepare an obscene book and difficult to conceive that it would be practical to hold one for the offense of publishing them. Nor is the rule this Court now adopts consonant with the conviction affirmed in *Ginzburg v. United States*, 1966, 383 U.S. 463, 86 S.Ct. 942, under an indictment charging violations of the federal obscenity statute.

In *Near v. Minnesota*, 1931, 283 U.S. 697, 716, 51 S.Ct. 625, 631, the Court said, ". . . [T]he protection even as to previous restraint is not absolutely unlimited. . . . [T]he primary requirements of decency may be enforced against obscene publications."² "The phrase,

²The motion picture cases are interesting applications. See, e.g., *Freedman v. Maryland*, 1965, 380 U.S. 51, 85 S.Ct. 734; *Times Film Corp. v. Chicago*, 1961, 365 U.S. 43, 81 S.Ct. 391; *Interstate Circuit Inc., v. City of Dallas*, 1968, 390 U.S. 673, 88 S. Ct. 1298. In *Tyrone Inc. v. Wilkinson*, 4 Cir. 1969, 410 F.2d 639, the court held "that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie." However, the district judge "properly refused to enjoin the state court prosecution for violation of the criminal obscenity statute in the absence of a showing of bad faith enforcement of a statute unconstitutional on its face or as applied." The theatre owner was required to deliver to the prosecuting attorney upon request a copy of the movie for reasonable use in the preparation and trial of the criminal charges. This follows the views expressed in *Metzger v. Percy*, 7 Cir. 1968, 393 F.2d 202, 204, where the court affirmed an injunction ordering return of four prints of a film seized without a search warrant; the affirmed order required the theatre owner to deliver to the prosecuting attorney upon request one print

'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 1957, 354 U.S. 436, 441, 77 S.Ct. 1325, 1328.³ But even if prior restraint is entirely reprobated, the majority opinion fails to draw the distinction between previous restraint on the right of free speech (like the seizure of a publication before it can be sold) and a criminal statute that imposes subsequent punishment

of the film for use in the trial of the criminal charge. "The decisions of this Court and of the District Court do not prohibit the prosecution under the Indiana obscenity statutes."

³The distinction has been repeatedly referred to although it has seldom been thought necessary to state it at length. But dissenting from a decision later overturned, Chief Justice Warren said in *Times Film Corp. v. Chicago*, 1961, 365 U.S. 43, 53, 81 S.Ct. 391, 397: "[T]his Court has carefully distinguished between laws establishing sundry systems of previous restraint on the right of free speech and penal laws imposing subsequent punishment on utterances and activities not within the ambit of the First Amendment protection." See also, e.g., Justice Brennan's observation in *Ginzburg, supra*, "A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use." 383 U.S. at 475, 86 S.Ct. at 949. And in *Near, supra*, the court said, "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions." 283 U.S. at 715, 51 S.Ct. at 630. Cf. Lockhart, Kamisar and Choper, *The American Constitution*, p. 761: "Why should anyone have to take the risk that the Court's judgment of what is obscene will not agree with his own honest belief that it is not obscene under the evolving constitutional standards? . . . Does the current uncertainty as to the standard suggest that imposition of criminal liability except for hard core pornography is inappropriate? That the preferred way to deal with the problem may be to place the book on trial as in *Memoirs*? See Kauper, *supra*, at 71-72; Lockhart & McClure (1960) at 106-07."

on pornography, an activity by definition not protected by the First Amendment.⁴

Concurring in the result in *Roth* and its companion case, *Alberts v. California*, 1957, 354 U.S. 476, 77 S.Ct. 1304, Chief Justice Warren spoke in terms that are applicable here: "The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct." 354 U.S. at 497, 77 S.Ct. at 1315.

The enactment of a criminal statute is intended to deter unlawful conduct. But any possibility of some other kind of state action against the individual is likewise a possible deterrent. The faint-hearted may be discouraged from pursuing a course of conduct by the

⁴Professor Paul A. Freund has written perceptively about the distinctions between prior restraint and subsequent punishment in the Supreme Court and *Civil Liberties*, 1951, 4 Vand. L. Rev. 533, 537. As he observes, "Certain distinctions commonly drawn between prior restraint and subsequent punishment will not bear analysis." But he writes that there are also real differences between the two and concludes, in language quoted with approval in *Kingsley Books*, *supra*, "In sum, it will hardly do to place 'prior restraint' in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances." 4 Vand. L. Rev. at 539. See also Schwartz, *A Commentary on the Constitution of the United States*, Part III, Rights of the Person, Volume I, Sanctity, Privacy and Expression, §450, pp. 336 et seq. (1968).

possibility of an order to appear in court. Many a man will flinch from any kind of a controversy with the state. Even the threat of facing a judge may be a potential prior restraint, and it is conceivable that some news dealers might be willing to run the risk of a fine rather than bold enough to pay the price of successfully contesting an adversary proceeding. Yet on a record that lacks evidence of any kind dealing with the psychology of individual intimidation, my brothers conclude intuitively that one restraint touches the defendant so lightly as to be lawful while the other bears so heavily as to be invalid.

Were the existence of any touch of "prior restraint" the tincture by which state conduct is stained unconstitutional, then presumably the existence of the possibility of an adversary hearing, or (in other contexts) the possibility of prosecution for criminal libel, or of the filing of a civil suit for libel, would color unlawful all government action in these areas. And it would mar the arrest, without a prior proceeding, of a defendant for violating the federal statute prohibiting the knowing use of the mails to transmit "every obscene, lewd, lascivious, indecent, filthy or vile article," 18 U.S.C. §1461; as well as for transgressing the law that makes it a crime to mail matter containing "upon the envelope or outside cover . . . language of an indecent, lewd, lascivious or obscene character," even though the contents are "otherwise mailable by law"; 18 U.S.C. §1463; and the provision that makes it a crime knowingly to import such material, 18 U.S.C. §1462. And such a requirement would apparently dye entirely unconstitutional 18 U.S.C. §1464, which makes it a criminal offense to utter "any obscene, indecent, or profane

language by means of radio communication," because there would be no way to have a prior adversary hearing with respect to such "one shot" utterances unless all radio communication were required to be previously transcribed.⁵

The procedure suggested in the majority opinion comes almost full cycle to the censorship condemned in *Near, supra*, in 1931. "This is the essence of censorship," the court there said, with regard to a procedure whereby the state might bring a publisher before a judge on a charge of conducting the business of publishing obscene, lewd and licentious matter and obtain an injunction against further publication.

Despite the allegations of the petition, the court does not find that the defendants have harassed the plaintiffs, or that they have employed threats of prosecution to chill freedom of speech, or that there has been any other kind of misuse of the processes of state criminal justice. If there were proof of such facts, a different case would be presented. But the court, in action from which I do not dissent, refrains even from issuing an injunction. It merely declares the state's procedure constitutionally infirm on its face.

⁵A question might be raised whether a warrant could properly be issued to seize pornography for use as evidence in such a "prior hearing," for a search warrant may be issued only for property "designed or intended for use or which is or has been used as a means of committing a criminal offense," Rule 41(b), Federal Rules of Criminal Procedure, or for evidence that a crime has been committed. *Warden v. Hayden*, 1967, 387 U.S. 294, 87 S.Ct. 1642.

When the Supreme Court, only a few weeks ago, held it unconstitutional to make private possession of obscene material a crime it said, "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Stanley v. Georgia*, 1969, ____ U.S. ____, ____, 89 S.Ct. 1243, 1249. If this be true, the Constitution does not deny the state the power to arrest a person on a charge of selling pornography that appeals only to prurency, affronts all community standards, and completely lacks social worth without first haling that person into court to caution him that what he is doing is unlawful. From the proposition that this is what the Constitution means I must dissent.*

*If the arrest had been valid, it would have been necessary to consider the validity of the seizures made of some of the material involved under the doctrine of the *Chimel* case, *supra*, and the possible applicability of the rule of that case to seizures made before it was decided. It would then also have been necessary to consider whether those particular publications obtained properly (for example by lawful seizure or by purchase) are protected by the First Amendment.

But since the majority does not reach these questions, it is needless to comment on them. Indeed, these might be matters for a single judge to decide after resolution of the questions involving constitutionality of the state statute.

Nor is there need for comment about the nature of the publications. Although they are unfit for publication in the published reports, I attach for the record xerox copies of the covers of five of them. The covers alone show that they proclaim the "leer of the sensualist," *Ginzburg*, 383 U.S. at 468, and that no dealer could fail to recognize the likely pornography of the contents.

(Signed) ALVIN B. RUBIN
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
September 3, 1969

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title Omitted in Printing)

Filed: Sep. 12, 1969

Notice is hereby given that Leander H. Perez, Jr., Louis Reichart, George Bethea and Earl Wendling, the defendants herein above named, hereby appeal to the Supreme Court of the United States from the Judgment rendered by the three-Judge Court on the 13th day of August, 1969, entered in this action on the 14th day of August, 1969.

This appeal is taken pursuant to 28 U.S.C.A. §§ 1253.

(Signed) CHARLES H. LIVAUDAIS,
CHARLES H. LIVAUDAIS,
Attorney for Appellants

(Signed) PRESTON H. HUFFT
PRESTON H. HUFFT,
Attorney for Appellants

(Certificate of Service Omitted)

ORDER

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title Omitted in Printing)

Filed: Sept. 15, 1969

Upon request of Counsel for Defendant-Appellants, and with the concurrence of Judges John Minor Wisdom and Edward J. Boyle, and having found pursuant to Subdivision 3, Rule 12 of the Rules of the Supreme Court of the United States as amended, that it is necessary and proper that the original exhibits (books, magazines and other publications) filed by defendants in this case under this docket number should be inspected by the Supreme Court of the United States in lieu of copies; and further that there should accordingly be a stay of the Order of this Court which directed that all seized materials be returned, instanter, by the defendants to those plaintiffs from whom they were seized,

IT IS HEREBY ORDERED That the Clerk of this Court is authorized and he is hereby directed to transport to the Clerk of Court of the Supreme Court of the United States all of the exhibits (books, magazines and other publications) filed by defendants in this case under this docket number, for inspection by the Supreme Court of the United States in lieu of copies; that the Clerk request the Clerk of Court of the Supreme Court of the United States to keep such original Exhibits safely, and request to return to this Court those Exhibits when they have served their purpose, all such original exhibits to be returned to the custody of the Clerk of this Court;

IT IS FURTHER ORDERED That there be a stay of the Order of this Court which directed that all seized materials be returned, instantler, by the defendants to those plaintiffs from whom they were seized.

New Orleans, Louisiana, this 15th day of September, 1969.

(Signed) ALVIN B. RUBIN
District Judge

/s/ CHARLES H. LIVAUDAIS
Attorney for Defendants-Appellants

MOTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Apr. 8, 1970

Now into Court come Leander H. Perez, Jr., Louis Reichart, George Bethea and Earl Wendling, through undersigned counsel, and move the Court for the following relief:

I.

That movers be relieved of the necessity of a "prior adversary judicial determination of obscenity" in enforcing LSA-R.S. 14:106, as imposed by this Court by Judgment rendered herein on July 14th, 1969;

II.

That the Court set aside that portion of the Judgment which ordered that all materials be returned, instant, to plaintiffs, and which further ordered that the said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs;

III.

That a day be set by this Court for the hearing of this Motion.

CHARLES H. LIVAUDAIS
Attorney for Movers
(Signed) CHARLES H. LIVAUDAIS
Post Office Box 1295
Chalmette, Louisiana 70043
Phone: 271-1658

ORDER

Considering the foregoing Motion it is ordered that there be a hearing on same on Wednesday, the 22nd day of April, 1970, at 2:00 o'clock P.M.

New Orleans, Louisiana this 10th day of April, 1970.

(Signed) EDW. J. BOYLE, SR.
JUDGE

(Certificate of Service omitted)

MEMORANDUM IN SUPPORT OF MOTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

May It Please The Court:

By Judgment rendered herein on the 14th day of July, 1969, the requirement of a "prior adversary judicial determination of obscenity" was imposed by this Court upon defendants in the enforcement of LSA-R.S. 14:106, and it was ordered by this Court that the materials involved be returned, *instanter*, to plaintiffs, and be suppressed as evidence in any pending or future prosecutions of plaintiffs.

In the same Judgment this Court retained Jurisdiction for the issuance of any further orders as may be necessary and proper.

Since the rendition of said Judgment the issue of the necessity of a "prior adversary judicial determination of obscenity" in cases such as ours has been directly placed before, and decided by, the Supreme Court for the United States of America, which has summarily affirmed the decision of a Three Judge Court in the United States District Court, S.D. New York, which held in two cases that there need not be an adversary hearing before an arrest for obscenity.

(New York Feed, Co., Inc. v. Leary and Milky Way Productions, Inc. v. Leary, Supreme Court Case Nos. 992 and 998, ____ U.S. ____, ____ S. Ct. ____, 38 LW 3335). Copies of the decision of the Three Judge Court and of the United States Law Week report are attached hereto for the convenience of the Court.

In view of the decision of the United States Supreme Court in the above, it is submitted that the relief sought in the Motion filed herewith should be granted.

Respectfully submitted,

CHARLES H. LIVAUDAIS,
Attorney for Movers
Post Office Box 1295
Chalmette, Louisiana 70043
Phone: 271-1658

(Certificate of Service omitted)

ORDER

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Jun. 3, 1970

The Court on April 22, 1970 heard the defendants' Motion to "be relieved of the necessity of a 'prior adversary judicial determination of obscenity' in enforcing LSA-R.S. 14:106, as imposed by this Court by Judgment rendered herein on July 14, 1969" and to "set aside that portion of the Judgment which ordered that all materials be returned, instantler, to plaintiffs, and which further ordered that the said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs," and the matter was taken under submission.

After considering the oral arguments and memoranda of counsel, the Court is of the opinion that the Motion should be, and it is hereby, DENIED.

Judge Alvin B. Rubin re-affirms his views expressed in his partial dissenting opinion previously filed herein.

New Orleans, Louisiana, June 2, 1970.

(Signed) JOHN MINOR WISDOM
UNITED STATES CIRCUIT
JUDGE

(Signed) EDW. J. BOYLE, SR.
UNITED STATES DISTRICT
JUDGE

(Signed) ALVIN B. RUBIN
UNITED STATES DISTRICT
JUDGE

Jack Peebles, Esq.

Charles H. Livaudais, Esq.

Supreme Court of the United States

No. 837 ----- , October Term, 19 69

Leander H. Perez, Jr.,
et al., Appellants,

v.

August M. Ledesma, Jr., et al.

APPEAL from the United States District Court for
the Eastern District of Louisiana.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and the case is placed on the summary calendar and set to be argued with No. 4, Younger v. Harris, No. 6, Boyle v. Landry, No. 11, Samuels v. Mackell, No. 20, Fernandez v. Mackell, No. 565, Dyson v. Stein, and No. 1149, Byrne v. Karalexis. In addition to the questions presented in the jurisdictional statement the parties are requested to brief and argue the following questions:

"(1) Was it an appropriate exercise of discretion for the three-judge court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969, in view of the pendency of the State prosecution charging violation of Louisiana Revised Statutes 14:106?

"(2) Was it an appropriate exercise of discretion for the three-judge court in paragraph 4 of said judgment to declare the St. Bernard Parish Ordinance No. 21-69 unconstitutional?"

FILE COPY

Supreme Court of the United States

OCTOBER TERM 1969

No. ~~887~~

Office Supreme Court, U.S.
FILED

NOV 12 1969

JOHN F. DAVIS, CLERK

**LEANDER H. PEREZ, JR., LOUIS REICHART,
GEORGE BETHEA, and EARL WENDLING,**
Appellants,

versus

**AUGUST M. LEDESMA, JR., HAROLD J. SPEISS,
and LAWRENCE P. PITTMAN,**
Appellees.

On Appeal from the United States District Court East-
ern District of Louisiana, New Orleans Division.

JURISDICTIONAL STATEMENT.

CHARLES H. LIVAUDAIS,
Attorney for Appellants,
2006 Packenham Drive,
Chalmette, Louisiana 70043.

Of Counsel:

PRESTON H. HUFFT,
Attorney at Law,
Chalmette, Louisiana.

ROBERT J. KLEES,
Attorney at Law,
Chalmette, Louisiana.

November, 1969.

INDEX.

	Page
THE OPINIONS BELOW	2
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
QUESTION PRESENTED BY THE APPEAL . . .	3
STATEMENT OF THE FACTS OF THE CASE . . .	4
THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL	6
CONCLUSION	8
APPENDIX "A"—MAJORITY OPINION OF THE THREE JUDGE COURT	11
APPENDIX "B"—DISSENTING OPINION	35
APPENDIX "C"—JUDGMENT OF THE THREE JUDGE COURT	44

TABLE OF AUTHORITIES.

Cases:

Ginzberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195	7
Holden v. Arnebergh, U.S., 89 S. Ct., 22 L. Ed. 2d 112	
Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127	6

TABLE OF AUTHORITIES—(Continued):

Cases—(Continued):

	Page
A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809	6
Roth v. United States; Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498	6, 7

Statutes:

Louisiana Revised Statutes, Title 14, Section 106	2, 4
United States Code, Title 28, Section 1253	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

**LEANDER H. PEREZ, JR., LOUIS REICHART,
GEORGE BETHEA, and EARL WENDLING,
Appellants,**

versus

**AUGUST M. LEDESMA, JR., HAROLD J. SPEISS,
and LAWRENCE P. PITTMAN,
Appellees.**

**On Appeal from the United States District Court, East-
ern District of Louisiana, New Orleans Division.**

JURISDICTIONAL STATEMENT.

Appellants appeal herein from the Judgment of a Three Judge Federal Court in the United States District Court for the Eastern District of Louisiana, New Orleans Division, which held, in a 2 to 1 decision, that although the Louisiana Criminal Obscenity Statute is Constitutional, arrests and prosecutions thereunder for sale of, or possession with intent to sell, obscene materials and publications, are invalid for lack of a judicial adversary hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms of the State Statute. Appellants submit that a judicial ad-

versary hearing is not required prior to arrest and prosecution of a person under the State Statute.

THE OPINIONS BELOW.

The Majority Opinion of the Three Judge Court of the United States District Court for the Eastern District of Louisiana, New Orleans Division, is presently unreported, and appears herein as Appendix "A". The Dissenting Opinion is also unreported and appears herein as Appendix "B". No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This action was instituted by Appellees in the District Court for the Eastern District of Louisiana, New Orleans Division, under 42 U.S.C. 1983 and 28 U.S.C. 1331, 1343 and 2201, to enjoin the prosecution of Appellee August M. Ledesma, Jr. in the 25th Judicial District Court for the Parish of St. Bernard, State of Louisiana; to declare unconstitutional Louisiana Revised Statute 14:106 (Obscenity) and St. Bernard Parish Ordinance 21-60, (copies thereof annexed to the Majority Opinion at Appendix "A" herein), and to enjoin any further actions thereunder; and for damages for appellees in the sum of \$30,000.00 each.

On July 14, 1969, two members of the Three Judge Court rendered an opinion holding that Louisiana Revised Statute 14:106 (Obscenity) is Constitutional, but that no arrest or prosecution thereunder can be made for crimes involving obscene materials or publications

unless there has been a judicial adversary hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms of the State Statute. The Court further refused to grant injunctions as to the pending prosecutions of Appellee Ledesma in the State Court, or as to future arrests and prosecutions under the State Statute, but nevertheless held that Appellants could not "in good faith" continue the pending prosecutions, or effect any future arrests or prosecutions under the State Statute.

The Dissenting Opinion of the Three Judge Court held that a prior Judicial Adversary Hearing is not necessary in the enforcement of the State Statute.

Judgment was entered into the record on August 13, 1969. A Notice of Appeal to this Court was filed in the United States District Court, Eastern District of Louisiana, New Orleans Division on September 12, 1969.

The Jurisdiction of this Court to review the decision of the Three Judge Court on direct appeal is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED BY THE APPEAL.

In a State Criminal Prosecution under a valid and Constitutional State Statute relative to obscene materials and publications, is it necessary that there be a Judicial Adversary Hearing, prior to arrest and prosecution of the defendant, to determine whether or not the materials and publications are obscene under the terms of the State Statute?

STATEMENT OF THE FACTS OF THE CASE.

On January 27, 1969, Appellants Reichart, Bethea and Wendling, law officers of the St. Bernard Parish Sheriff's Office, arrested Appellee Ledesma at the Broad-Bruxelles Seafood and News Center No. 3 at Arabi in St. Bernard Parish, Louisiana, and booked him with violation of Louisiana Revised Statute Title 14:106, and St. Bernard Parish Police Jury Ordinance 21-60, relative to obscenity. Immediately prior to the arrest Appellant Wendling had purchased two publications from Appellee Ledesma, namely: One issue of Rapture Magazine (\$2.00) and one issue of Naked Films Magazine (\$2.50). Appellant Reichart, also immediately prior to the arrest, had purchased one issue of Nudist Adventure Magazine (\$2.50), and one issue of National Climax newspaper. Incidental to the arrest Appellants took as evidence from Appellee's shelves thirty-five (35) publications and four (4) decks of playing cards, the originals of which have been transported to the Clerk of this Court with the Record transmitted from the District Court from which this appeal was taken.

Four Bills of information were filed against Ledesma in the 25th Judicial District Court for the Parish of St. Bernard, State of Louisiana, by Appellant Perez, District Attorney for the said 25th Judicial District, said Bills being based upon Ledesma's possession and exhibition of the aforementioned publications and playing cards. Subsequently, Appellant Perez entered a Nolle Prosequi in each of the Bills of Information relative to Violations of the St. Bernard Parish Police Jury Ordinance. The remaining two cases relative to Violations of the Louisiana State Statute are pending trial in the State Court. Appellees Ledesma, Speiss and Pittman, allegedly partners in the operation of

the Broad-Bruxelles Seafood and News Center No. 3, were at no time prohibited from actively engaging in their business of selling publications, food and other items at their establishment.

On February 17, 1969, Appellees filed a Complaint in the District Court for the Eastern District of Louisiana, New Orleans Division under 42 U.S.C. 1983 and 28 U.S.C. 1331, 1343 and 2201, seeking to enjoin the above prosecution of Appellee Ledesma in the State Court; to declare unconstitutional Louisiana Revised Statute 14:106 (Obscenity) and St. Bernard Parish Ordinance 21-60, and to enjoin any future arrests or prosecutions thereunder; and for damages for Appellees in the sum of \$30,000.00 each. A Three Judge Court was appointed to hear the matter, and after a hearing on the Motions for Injunctive Relief as stated above, two members of the Three Judge Court rendered an opinion holding that Louisiana Revised Statute 14:106 (Obscenity) is Constitutional, but that no arrest or prosecution thereunder can be made for crimes involving obscene materials or publications unless there has been a Judicial Adversary Hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms of the State Statute. The Court further refused to grant Injunctions as to the pending prosecutions of Ledesma in the State Court, or as to future arrests and prosecutions under the State Statute, but nevertheless held that Appellants could not "in good faith" continue the pending prosecutions, or effect any future arrests or prosecutions under the State Statute. The Dissenting Opinion of the Three Judge Court held that a Prior Judicial Adversary Hearing is not necessary in the enforcement of the State Statute. It is from that portion of the Majority Opinion requiring a Prior Judicial Adversary Hearing in the enforcement of Louisiana Revised Statute 14:106 (Obscenity) that this appeal is taken.

THE QUESTION PRESENTED IS SUBSTANTIAL.

A substantial question is presented because a Federal Three Judge Court, in a 2 to 1 decision, has held that, although a State Criminal Statute relative to obscene materials and publications is valid and Constitutional, State Officials nevertheless may not "in good faith" perform their duty to the Public and enforce the Law, because of the lack of a *Procedural Device* imposed by the Federal Court—namely, a Judicial Adversary Hearing, prior to arrest or prosecution, to determine whether or not the materials or publications are obscene under the terms of the State Statute.

Ours is *not* a case involving a civil procedure for censorship, and it is *not* a case involving questions of illegal Search and Seizure, as were the cases of *Marcus v. Search Warrant*, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127, and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809.

The issue now before this Court is one of *Criminal Procedure* in the enforcement of a valid State Criminal Statute. In two similar cases, Chief Justice Warren, in a concurring opinion upholding the convictions of the defendants in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1513, stated that

"It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture"

" . . . The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide."

In the *Roth* and *Alberts* cases, *supra*, decided June 24, 1957, and the case of *Ginzberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195, decided April 22, 1968, this Court affirmed criminal convictions where there had been no Prior Judicial Adversary Hearing. In those cases the ordinary course of Criminal Procedure was followed and the defendants were afforded all the protections which the law allowed.

The proponents of the Prior Judicial Adversary Hearing Procedure in Criminal prosecutions relative to obscene publications urge that this extraordinary criminal procedure is necessary to protect freedom of speech and expression. Such is not the case. In every criminal prosecution the accused, after arrest, has the immediate right to Move to Suppress the Evidence to be used against him, and thus is afforded an Adversary Judicial Hearing to question the evidence. To force the Hearing to take place *Prior* to the arrest in cases dealing with obscene publications gives no more protection to the Publications than having the Hearing after arrest. A Hearing Prior to arrest serves only to impede the State in enforcing the law, and gives extraordinary protection to the law-breaker, not to the Publications.

This case comes before this Court at a time when the People of this Country are insisting on strict enforcement of laws against crime, and a swift and forceful halt to the dissemination of obscene publications into our Society.

The State Governments and the Citizens have a right to know now whether or not the Federal Courts are going to impose a new Procedural Device upon the States in the enforcement of valid and Constitutional State Criminal Statutes relative to obscene materials and publications; and if there is to be such a new procedure legislated by the Courts, the State Governments and the Citizens have a right to be told the mechanics of the Procedure to be used.

Under these circumstances the question herein deserves plenary consideration, and should not be determined without briefs and oral argument.

CONCLUSION.

It is submitted that in a State Criminal Prosecution under a valid and Constitutional State Statute relative to obscene materials and publications, it is not necessary that there be a Judicial Adversary Hearing, prior to arrest and prosecution of the defendant, to determine whether or not the materials and publications are obscene under the terms of the State Statute.

It is further submitted that the issues here are most substantial; and that the federal question involved is of

nationwide importance, and deserves plenary consideration with benefit of briefs and oral argument.

Respectfully Submitted,

CHARLES H. LIVAUDAIS,
Attorney for Appellants.

APPENDICES

APPENDIX "A".

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION.**

No. 68-1927 CIVIL ACTION SECTION D.

DELTA BOOK DISTRIBUTORS, INC., ET AL.

versus

ALWYNN J. CRONVICH, ETC., ET AL.

No. 69-322 CIVIL ACTION SECTION D.

AUGUST M. LEDESMA, JR., ET AL.

versus

LEANDER H. PEREZ, JR., ETC., ET AL.

Jack Peebles, Esq., Attorney for Plaintiffs.

A. W. Wambsgans, Esq., James F. Quaid, Esq.,
Charles H. Livaudais, Esq., Attorneys for De-
fendants.

Before WISDOM, Circuit Judge, and BOYLE and RUBIN,
District Judges.

BOYLE, District Judge:

These actions arise from the arrest by the defendant law enforcement officers in Jefferson¹ and St. Bernard² Parishes, Louisiana, of the individual plaintiffs and the incidental seizures of quantities of publications claimed to be obscene.

Those plaintiffs, residents of the Parishes of Orleans and Jefferson, are the owners and operators of newsstands in both Parishes. The corporate plaintiff, Delta Book Distributors, Inc., is a New York corporation engaged in the business of distributing books and magazines to newsstands, including those of the individual plaintiffs.

Jurisdiction is asserted and exists under 28 U.S.C. 1331, 1343, 2201 and 2281 and 42 U.S.C. 1983.

The facts in both cases are substantially parallel. In both, the arrests and seizures were made without warrants and without prior adversary judicial hearing on or determination of the claimed obscene character of the seized materials. In both, publications similar to those seized were purchased by the enforcement officers³ prior to the arrests.

¹ In Delta Book, the defendant Cronvich is Sheriff of Jefferson Parish, the defendants Lightell, Lemoine and Frisch are his deputies and the defendant Lentini is Marshal of the Town of Kenner, Jefferson Parish.

² In Ledesma, the defendant Perez is District Attorney and the defendants Reichart, Wendling and Bethea are Deputy Sheriffs of the Parish of St. Bernard.

³ Three by the Jefferson Parish officers and four by their St. Bernard Parish counterparts.

Following their arrests two-count bills of information were filed against the individual plaintiffs in the Delta Book case⁴ and against only one of the plaintiffs in the Ledesma case, namely, August M. Ledesma, Jr.,⁵ charging violations of the Louisiana obscenity statute. Additionally, Ledesma was charged in two bills⁶ with violations of the St. Bernard Parish obscenity ordinance,⁷ which, prior to the hearing herein, had been nolle prosequied.

The charges⁸ filed against Ledesma in St. Bernard Parish were laid under Louisiana Revised Statutes, Title

⁴The prosecutions instituted in the 24th Judicial District Court for the Parish of Jefferson are styled and numbered as follows: State of Louisiana v. Fernin J. Farrell, No. 113-050; Ronald J. Walker, No. 113-051; Ronald J. Walker and Charles Rhody, No. 113-052; Lawrence P. Pittman, Jr., Harold J. Spiess, Jr. and August M. Ledesma, Jr., No. 113-053; Lawrence P. Pittman, Jr., No. 113-054.

⁵State of Louisiana v. August M. Ledesma, Jr., Nos. 17-085 and 17-086 of the docket of the 25th Judicial District Court for the Parish of St. Bernard.

⁶State of Louisiana v. August M. Ledesma, Jr., Nos. 17-087 and 17-088, 25th Judicial District Court for the Parish of St. Bernard.

⁷No. 21-60.

⁸In case No. 17-085, it is charged that Ledesma, on January 27, 1969, "did produce, sell, exhibit, give or advertise with the intent to primarily appeal to the prurient interest of the average person, lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character * * *" in violation of R.S. 14:106(2).

In case No. 17-086, it is charged that Ledesma "did possess" rather than "did produce" the objects described [in the information in No. 17-085] in violation of R.S. 14:106(3).

14. Section 106 A(2) and A(3).⁹ Those¹⁰ against the Delta Book plaintiffs in Jefferson Parish are brought under the same subsections of the Louisiana statute in addition to subsection A(7).¹¹

Unlike the St. Bernard Parish officers, who seized forty-five publications and a deck of playing cards, while leaving more than three hundred similar publications, the Jefferson Parish officers seized all copies of the alleged offending publications, including multiple copies of some, which could be found on the premises.¹²

In both cases, the Federal constitutional issues raised herein were presented to the respective State Trial Courts in Motions to Quash the bills of information and to Suppress the seized evidence and were decided adversely to the plaintiffs herein.

⁹ See Footnote 23.

¹⁰ The bills of information are identical as to all plaintiffs (see Footnote 4) except as to the dates on which and places at which the offenses are alleged to have occurred, and in substance charge that the respective plaintiffs did " * * * wilfully and intentionally exhibit and possess with intent to display, advertise and/or sell lewd, lascivious and/or sexually indecent magazines * * * " (Count 1) and did " * * * wilfully and intentionally exhibit and possess with the intent to display, advertise and/or sell lewd, lascivious and/or sexually indecent magazines and/or books * * * to the general public and/or particularly in the presence of unmarried persons under the age of 17 years * * * " (Count 2) in violation of Sections 2, 3 & 7, R.S. 14:106.

¹¹ See Footnote 23.

¹² From the Expressway News Center, 56 magazines were seized on August 23, 1968; from the Veterans Newsstand, 200 and 296 books and magazines were seized on September 6 and October 18, 1968, respectively; and from the Broad Bruxelles Seafood & News Center, 138 and 62 books and magazines were seized on October 3 and 18, 1968, respectively.

In view of the result we reach, it is unnecessary in either case to consider whether the seized publications are in fact obscene.¹³

The principal relief prayed for in each case is identical,¹⁴ viz, a declaratory judgment decreeing the Louisiana statute unconstitutional (a) on its face and (b) as applied to the plaintiffs; preliminary and permanent injunctions enjoining the defendants¹⁵ (a) from prosecuting the plaintiffs under the pending charges, (b) from prosecuting them for violation of the statute in the future and (c) from seizing materials in the future (1) without a prior adversary judicial proceeding and (2) without a warrant; the return of the seized materials and damages.

We have for decision all issues, except the issue of damages which was severed and reserved for the single Judge Court.

¹³ In the Delta Book case, the parties stipulated, though subject to the plaintiffs' objection of irrelevancy, that if called as witnesses "men and women from different income levels and various ages, law enforcement personnel, professors, school teachers, ministers, priests and rabbis would testify that in their opinion all of the aforementioned books and magazines are: (a) obscene, in the case of witnesses called by the defendants, and (b) not obscene, in the case of said witnesses called by the plaintiffs."

Also in the Delta Book case, "samples" of the seized publications were received in evidence subject to plaintiffs' objection of irrelevancy.

In the Ledesma case, all of the seized materials were received in evidence subject also to the plaintiffs' objection of irrelevancy.

¹⁴ In the Ledesma case, the plaintiffs also seek to have the St. Bernard Parish obscenity ordinance declared unconstitutional.

¹⁵ In Delta Book, the District Attorney for the Parish of Jefferson is not a party defendant. In Ledesma, the District Attorney for the Parish of St. Bernard is a defendant.

The guarantee of freedom of speech embodied in the First Amendment to the United States Constitution does not extend to obscenity. *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). Consequently, obscene utterances and materials, properly defined, may be the subject of Federal and State regulation or suppression. However, since "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line,"¹⁶ any attempt, be it Federal or State, to regulate or suppress allegedly obscene material must be closely scrutinized to the end that protected expression is not abridged in the process. Accordingly, "the Constitution requires a procedure 'designed to focus searchingly on the question of obscenity' before speech can be regulated or suppressed. *Marcus v. Search Warrants*, 367 U.S. 717, 732, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127," and "[t]he dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211, 84 S. Ct. 1723, 12 L. Ed. 2d 809; *Metzger v. Percy*, 7 Cir., 393 F. 2d 202, 204; *United States v. Brown*, S.D. N.Y., 274 F. Supp. 561; *Cambist Films, Inc. v. Illinois*, N.D. Ill., Eastern Div., 292 F. Supp. 185, decided October 21, 1968."¹⁷

Since prior restraint upon the exercise of First Amendment rights can be exerted through seizure¹⁸

¹⁶ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963).

¹⁷ *Cambist Films, Inc. v. Tribell*, 293 F. Supp. 407 (E.D. Ky. 1968).

¹⁸ As *Cambist Films, Inc. v. Tribell*, footnote 3, *supra*, makes clear, the principles announced in such cases as *A Quantity*

(with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.¹⁹

We are mindful of the fact that even attempts to regulate obscenity incorporating procedures for affording the required adversary hearing would themselves constitute prior restraints.²⁰ For example, it might be argued that the expense of legal representation at such hearings, the apprehension as to whether or not the allegedly obscene materials should continue to be sold pending the outcome of the hearing and so forth would serve to "chill"²¹ First Amendment rights. We can readily conceive, therefore, that much litigation would be spawned by the adoption of adversary hearing procedures. Nonetheless, it is apparent that there must be some permissible prior restraint, be it however subtle, if obscenity is not protected by the First Amendment and State attempts to regulate it are to be enforceable. It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the

of *Books*, *supra*, with respect to searches and seizures in civil forfeiture cases apply with equal, if not greater, force in cases involving searches and seizures incident to criminal prosecutions.

¹⁹ *Poulos v. Rucker*, 288 F. Supp. 305 (M.D. Ala. 1968).

²⁰ "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene . . ." *Smith v. People*, 361 U.S. 147, 154-155, 80 S. Ct. 215, 219, 4 L. Ed. 2d 205 (1960).

²¹ *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

enforcement of any such regulations. However, these procedures, among others, may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity.

Applying these principles to the cases before us, the arrests, as well as the seizures claimed to be incident thereto, are clearly invalid for lack of a prior adversary determination of the obscenity of the materials upon which the arrests and seizures were based. The fact that in each case some materials were purchased rather than seized is of no moment in view of the requirement of an adversary determination of obscenity prior to arrest or threat of arrest.²²

We turn now to the specific relief prayed for in each of the suits.

Initially, we are asked to declare the Louisiana Obscenity Statute²³ unconstitutional on its face and as applied. This same relief is sought with respect to the St. Bernard Parish Obscenity Ordinance.²⁴ Since the Louisiana statute is composed of three lettered paragraphs, with Paragraph "A", defining obscenity, being further subdivided into seven subparts each of which delineates a separate offense, we address ourselves solely to those subsections under which any plaintiff was charged in

²² Of course, the defendants cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto has passed.

²³ La. R.S. 14:106. See Appendix A.

²⁴ Ordinance #21-60 of the Parish of St. Bernard. See Appendix B.

either of the cases.²⁵ The subsections of Paragraph "A" with which we are concerned are "(2)", "(3)" and "(7)".

The plaintiffs contend that the statute is unconstitutional on its face because it defines obscenity too broadly, affords no ascertainable standard of guilt, and lacks the required element of scienter.

We are aware of the United States Supreme Court's per curiam reversal in *Henry v. Louisiana*, 392 U.S. 655, 88 S. Ct. 2274, 20 L. Ed. 2d 1343 (1967), citing only *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967), also a per curiam opinion. In view of the fact that the decision of the Louisiana Supreme Court in *Henry* (reported at 198 So. 2d 889) not only upheld the constitutionality of La. R.S. 14:106 §A(2) and (3) as not being violative of freedom of speech or vague, but, in addition, erroneously²⁶ construed the term "contem-

²⁵ This Court declines to render a declaratory judgment concerning the constitutionality vel non of the entire statute in view of the fact that as to those sections or subsections under which plaintiffs have not been charged there is no "actual controversy" as required by 28 U.S.C. §2201. Although "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief" *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967) and abstention has been disapproved in cases involving First Amendment rights, nonetheless, the Supreme Court in *Zwickler* in footnotes 3 and 15 recognized that before declaratory relief is proper the usual prerequisites therefor must be established. Accordingly, as to those sections under which plaintiffs have not been charged, the prayer for declaratory relief comes prematurely in that there is neither "substantial controversy" nor "sufficient immediacy." See *Machesky v. Bizzell*, 5 Cir., 1969, F. 2d [No. 26832, May 5, 1969].

²⁶ *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

porary community standards" to embody a purely local, rather than national, norm, we cannot conclude from the per curiam opinion that the Supreme Court of the United States passed upon the constitutionality of La. R.S. 14:106.

A study of subsections "(2)" and "(3)" convinces us that neither subsection is unconstitutional on its face. Subsection "(3)" incorporates the standards of obscenity contained in subsection "(2)". We find that these subsections define obscenity in terms substantially similar to those approved in *Roth v. United States*, *supra*, in that expression regulated by the statute is that intended "to primarily appeal to the prurient interest of the average person." As was the court in *Cambist Films, Inc. v. Tribell*, *supra*, we are aware of the language of Mr. Justice Brennan in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966) to the effect that material may not be legally adjudged obscene unless it meets each of the following three tests: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." And, we concur in the statement of the Court in *Tribell*, *supra*, that "[i]n listing these three elements, Mr. Justice Brennan was not making *additional* requirements, but was merely explaining the *Roth* test." Therefore, we find that subsections (2) and (3) of Paragraph A of La. R.S. 106, while not explicitly inclusive of the tripartite test enunciated by Mr. Justice Brennan, do, if judicially in-

terpreted and applied in light thereof, satisfy constitutional requirements.

Plaintiffs' charge that the statute is vague is without merit in so far as subsections (2) and (3) are concerned. The definition of obscenity through the aid of adjectives such as "lewd," "lascivious" and "filthy" and the adjectival phrase "sexually indecent" embodies an ascertainable standard of guilt when these terms are taken to have their commonly accepted meanings. Furthermore, if the term "obscene" is itself not unconstitutionally vague,²⁷ a fortiori, the term "obscenity" explained by the adjectives used in these subsections is not vague.

Finally, plaintiffs' attack upon the statute for lack of the required element of "scienter" is without merit. The use of the word "intentional" and the phrase "with the intent" in the statute satisfy the requirements for "scienter" set forth in *Smith v. People*, *supra*. Indeed, we concur in the following statement of the Supreme Court of Louisiana in *State v. Roufa*, 241 La. 474, 129 So. 2d 743 (1961): "We conclude that the word 'Intentional' and the phrase 'With Intention' (sic) in the Louisiana Obscenity Statute mean that knowledge is implied where one has criminal intent. It leaps to the mind that knowledge is necessary to intention and that one cannot have intention without knowledge. We find that Paragraph Two of LSA-R.S. 14:106 meets the requirements laid down in the Smith case" (Citations and footnote reference omitted.)

Subsection "(7)" of Paragraph A is unconstitutional on its face as plaintiffs contend. A simple reading of this sub-

²⁷ *Mishkin v. State of New York*, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966).

section reveals that by its terms it is overbroad.²⁸ A literal application thereof would, for example, make it a criminal offense to display, for any purposes, universally accepted anatomical works or recognized works of art or the like anywhere but "in art galleries." Such limitation is patently unconstitutional.

We, here, note that the fact that subsection "(7)" of Paragraph A of the statute is unconstitutional, is not fatal to the entire statute in light of the severability clause found in Section 2 of Act 647 of 1968.²⁹

We find a total lack of evidence to support the contention that La. R.S. 14:106 is unconstitutional as applied to the plaintiffs.³⁰ To the extent that this contention is based upon the lack of the required procedural safeguards prior to seizure or arrest, it has been disposed of by what we have hereinabove held with respect to the necessity of an adversary judicial determination of obscenity.

The plaintiffs in the case arising from St. Bernard Parish were charged under the St. Bernard Obscenity Ordinance

²⁸ "The portrayal of sex, e.g. in art, literature and scientific works, is not itself sufficient reason to deny the material the constitutional protection of freedom of speech and press." *Roth v. United States*, *supra*.

²⁹ La. R.S. 14:106 would appear to be severable even in the absence of a severability clause in view of the fact that each subpart of Paragraph A delineates a separate and independent offense. The act would, with clarity, state an offense notwithstanding total deletion of subpart "(7)" of Paragraph A. For a comprehensive discussion of the factors to be considered in determining severability see *Statutes and Statutory Construction*, Sutherland, Vol. 2, Sections 2401 et seq.

³⁰ We make no finding, however, as to whether the allegedly obscene materials here are protected by the First Amendment, and whether, therefore, the statute would be unconstitutional as applied to them. That question requires the application of the constitutional standard of obscenity to the seized printed matter. We leave the determination to be made in the first instance by the state court after the adversary hearing which we today hold necessary.

as well as under the State statute. Subsequently, but prior to the hearing in this court, the charges under the ordinance were nolle prosequied. However, we are asked to pass on the constitutionality of this ordinance for the reason that plaintiffs fear prosecution thereunder at some future date.³¹ Accordingly, in order to grant complete relief, we have examined the ordinance and find it to be unconstitutional and unenforceable. The ordinance is poorly drafted and in some respects may be unintelligible and, therefore, is mortally infected with the vice of vagueness. Additionally, the ordinance is too broad, in that it seeks to regulate material protected by the First Amendment as interpreted by recent judicial decisions.

Assuming that this ordinance was constitutional or that a constitutional replacement therefor was enacted, local authorities in the enforcement thereof would be bound by the same requirement of an adversary hearing as State authorities are with respect to the enforcement of State statutes.

Plaintiffs seek to enjoin the defendants from proceeding with the prosecutions pending against them, as well as from instituting any new prosecutions and undertaking any further seizures or arrests. We decline to grant any injunctive relief in either of the cases before us.

³¹ Although it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance, as distinguished from statutes of state-wide application, *Moody v. Flowers*, 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967), the court takes this opportunity to express its views on the constitutionality of the ordinance in the interest of judicial economy. The view expressed by this court concerning the constitutionality of the ordinance is shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith.

In view of our holding that the arrests and seizures in these cases are invalid for want of a prior adversary judicial determination of obscenity, which holding requires suppression and return of the seized materials,³² the prosecutions should be effectively terminated. We have no reason to question that the defendant law officers and prosecuting attorneys of both Parishes will, in good faith, abide by our rulings herein as to pending or future prosecutions or future arrests and seizures. Doing so will make it unnecessary to issue any injunctions with respect to either, whether under the State statute or the St. Bernard Parish ordinance.³³ However, we retain jurisdiction for the purposes of hereafter entering any orders necessary to enforce the views expressed herein.

Accordingly, for the reasons assigned, IT IS ORDERED that judgment in both cases be entered decreeing:

1. That all seized materials be returned, instanter, to those from whom they were seized,

³² *Chimel v. State of California*, decided by the Supreme Court of the United States on June 23, 1969, 37 L.W. 4613, limits the area in which a search may be made incidental to a lawful arrest. We need not be concerned with whether *Chimel* applies to searches and seizures occurring before June 23, 1969. In the light of the absence of any direct controlling expression in *Chimel* and *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965); *Fuller v. Alaska*, 393 U.S. 80, 89 S. Ct. 61, 21 L. Ed. 2d 212 (1968), and *Desist v. U.S.*, 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969), it would appear that the limiting effect of *Chimel* would not be held retrospectively applicable. However, even assuming the contrary, in view of our holding that the lack of a prior adversary hearing taints the warrantless arrests involved here, the searches, whether confined to the limits set by *Chimel* or not, and the resultant seizures would fall by reason of the unlawful arrests incidental to which the defendants urge they acted in seizing the materials.

³³ See Footnote 29, *supra*.

2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,

3. That the preliminary and permanent injunctions prayed for be denied, and

4. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper.

New Orleans, Louisiana, July 14th, 1969.

(S.) JOHN MINOR WISDOM,
United States Circuit Judge.

(S.) EDW. J. BOYLE, SR.,
United States District Judge.

RUBIN, J., dissents in part and will file written reasons.

No. 69-322 CIVIL ACTION SECTION D.

AUGUST M. LEDESMA, JR., ET AL.

versus

LEANDER H. PEREZ, JR., ETC., ET AL.

For the reasons assigned in the foregoing 3-Judge Court opinion, IT IS ORDERED that judgment be entered herein decreeing:

1. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional.
2. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper.

New Orleans, Louisiana, July 14th, 1969.
(S.) EDW. J. BOYLE, SR.,
United States District Judge.

APPENDIX "A" TO MAJORITY OPINION.

§ 106. Obscenity

A. Obscenity is the intentional:

(1) Exposure of one's person in a public place in such manner that any part of a sex organ may be seen by another person, with the intent of arousing sexual desire.

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) Performance by any person or persons in the presence of another person or persons with the intent of arousing sexual desire, of any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement.

(5) Solicitation or attempt to entice any unmarried person under the age of seventeen years to commit any act prohibited by this section.

(6) Requirement by a person, as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication to a purchaser or consignee, that such purchaser or consignee receive for resale any other article, book or publication reasonably believed by such purchaser or consignee to contain articles or material of any kind or description which are designed, intended or reasonably calculated to or which do in fact appeal to the prurient interests of the average person in the community, as judged by contemporary community standards, or the denying or threatening to deny any franchise or to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles or things or by reason of the return thereof.

(7) Display of nude pictures of a man, woman, boy or girl in any public place, except as works of art exhibited in art galleries.

B. In prosecutions for obscenity, lack of knowledge of age or marital status shall not constitute a defense.

C. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both.

When a violation of Paragraphs (1), (2), (3), and (4) of Subsection (A) of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than one thousand dollars, or imprisoned for not more than five years with or without hard labor, or both.

Amended by Acts 1958, No. 388, § 1; Acts 1960, No. 199, § 1; Acts 1962, No. 87, § 1; Acts 1968, No. 647, § 1, emerg. eff. July 20, 1968, at 1:30 P.M.

APPENDIX "B" TO MAJORITY OPINION.

**POLICE JURY
ST. BERNARD PARISH
ST. BERNARD COURTHOUSE ANNEX
CHALMETTE, LOUISIANA**

**EXTRACT OF THE OFFICIAL PROCEEDINGS OF THE
POLICE JURY OF THE PARISH OF ST. BERNARD,
STATE OF LOUISIANA, TAKEN AT THE REGULAR
MEETING HELD IN THE POLICE JURY ROOM OF
THE COURTHOUSE ANNEX, AT CHALMETTE,
LOUISIANA, ON NOVEMBER 2, 1960, AT ELEVEN
O'CLOCK (11:00) A. M.**

On motion of Celestine Melerine, seconded by Joseph V. Papania and upon recommendation of the District Attorney of the Parish of St. Bernard, the following Ordinance was adopted.

ORDINANCE #21-60

An Ordinance known as the Ordinance of St. Bernard Parish, relative to prohibiting and defining the offense of obscenity and indecent literature, adding thereto the offense of "attempt", and prescribing penalties for the violation thereof.

SECTION 1.

Offense of obscenity defined and prohibited.

SECTION 2.

BE IT ORDAINED, by the Police Jury of the Parish

of St. Bernard that obscenity is prohibited and is hereby defined as the intentional.

SECTION 3.

BE IT FURTHER ORDAINED, that public personal exposure of the female breast or the sexual organs or fundament of any person of either sex.

SECTION 4.

BE IT FURTHER ORDAINED, that production, sale, exhibition, possession with intent to display, or distribution of any obscene, lewd, lascivious, prurient or sexually indecent print, advertisement, picture, photograph, written or printed composition, model, statute, instrument, motion picture, drawing, phonograph recording, tape or wire recording, or device or material of any kind.

SECTION 5 (a)

BE IT FURTHER ORDAINED that the performance of any dance, song, or act in any public place, or in any public manner representing or portraying or reasonable calculated to represent or portray any act of sexual intercourse between male and female persons, or any act of perverse sexual intercourse or contact, or unnatural carnal copulation, between persons of any sex, or between persons and animals.

SECTION 5 (b)

OR FURTHER, the performance in any public place, or any public manner of any obscene, lewd, lustful, lascivious, prurient or sexually indecent dance, or the rendition of any obscene, lewd, lustful, lascivious, prurient or sexually indecent song or recitation.

SECTION 6.

BE IT FURTHER ORDAINED, PRODUCTION, POSSESSION WITH INTENT to display, exhibition, distribution or sale of any literature as defined herein containing one or more pictures of nude or semi-nude female persons, wherein the female breast or any sexual organ is shown or exhibited, and where, because of the number or manner of portrayal in which such pictures are displayed in such literature, they are designed to appeal predominantly to the prurient interest.

SECTION 7.

BE IT FURTHER ORDAINED, that it shall also be unlawful for any person to attempt to commit any of the violations set forth in this section.

SECTION 8.

BE IT FURTHER ORDAINED, that any person upon conviction of a violation of this section shall be sentenced to serve not more than ninety (90) days, or pay a fine of not more than one hundred dollars (\$100.00) or both, in the discretion of the Court.

BE IT FURTHER ORDAINED, that persons convicted of an attempt to violate this section shall be sentenced to not more than one-half of the maximum penalty prescribed, or pay not more than half of the maximum fine or both, as set forth above.

SECTION 9.

BE IT FURTHER ORDAINED, that the word literature as used herein means and includes a book, booklet, pamphlet, leaflet, brochure, circular, folder, handbill or maga-

zine. The word picture as used herein means and includes any photograph, lithograph, drawing, sketch, abstract, poster, painting, figure, image, silhouette, representation or facsimile.

SECTION 10.

BE IT FURTHER ORDAINED, that this Ordinance shall be published in the Official Journal of the Parish, the St. Bernard Voice.

This Ordinance having been submitted to a vote, the vote thereon was as follows:

YEAS: Henry C. Schirddler, Jr., Joseph V. Papania, Peter N. Huff, Peter Perniciaro, Louis P. Munster, John W. Booth, Sr., Claude S. Mumphrey, Celestine Melerine, Edward L. Jeanfreau, and Mrs. Blanche Molero.

NAYS: None.

ABSENT: None.

And the Ordinance was declared adopted on this, the 2nd day of November, 1960.

(S.) VALENTINE RIESS,
(Valentine Riess),
President.

(S.) JOSEPH E. SORCI,
(Joseph E. Sorci),
Secretary.

CERTIFICATE.

I CERTIFY THAT the above and foregoing is a true and correct copy of an ordinance adopted by the St. Bernard Parish Police Jury at a Regular meeting held at Chalmette, Louisiana, in the Police Jury Room at the Courthouse Annex on the 2nd day of November, 1960.

Witness my hand and the Seal of the St. Bernard Parish Police Jury this 11th day of February, 1969.

R. M. McDOUGALL,

(R. M. McDougall).

APPENDIX "B".

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION.**

CIVIL ACTION No. 68-1927 SECTION "D".

**DELTA BOOK DISTRIBUTORS, INC., ET AL.,
Plaintiffs,**

versus

**ALWYNN J. CRONVICH, ETC., ET AL.,
Defendants,**

CIVIL ACTION No. 69-322 SECTION "D".

**AUGUST M. LEDESMA, JR., ET AL.,
Plaintiffs,**

versus

**LEANDER H. PEREZ, JR., ETC., ET AL.,
Defendants.**

Jack Peebles, Esq.,

Attorney for Plaintiffs.

A. W. Wambsgans, Esq.,

Attorney for Defendants.

James F. Quaid, Esq.,

Attorney for Defendants.

Charles H. Livaudais, Esq.,

Attorney for Defendants.

RUBIN, District Judge, dissenting:

I respectfully dissent from that portion of the decision that holds it unconstitutional for the state to arrest a defendant on a charge of violating a valid statute punishing the crime of selling pornographic literature, and from the suggestion that, to be constitutional, a state statute "may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity."

My brothers and I agree that we are bound by the principal "that obscenity is not within the area of constitutionally protected speech or press." *Roth v. United States*, 1957, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309. Adhering, as we must, to the repeated decisions of a majority of the Supreme Court, we unanimously reject the dissenting view of Justices Black and Douglas that both federal and state governments are "without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind. . . ." *Ginzburg v. United States*, 1966, 383 U.S. 463, 475, 86 S.Ct. 942, 950.

But the majority of this court suggests that, in order to exercise its constitutional power, the state must adopt a procedure unprecedented in criminal law and incapable of effective enforcement. For, if their view is correct, no prosecution could be commenced under this statute that we all agree is constitutional unless the state first holds a separate adversary proceeding against every single news dealer for each item of pornography that he might choose to sell at any time. Even though a court might have decided that a dealer on one street was violating the law by selling a work that had been held pornographic, a dealer on the next street could not be prosecuted until he also

had been afforded a "prior adversary hearing" concerning the self-same item. And after it had been determined that the current issue of "Spread Eagle," consisting of photographs proclaimed to be for "Adults Only" (State Exhibit 7), violated the statute, the defendant would be free (by simply substituting one model for another) to sell another issue of that prurient publication containing photographs having identical pornographic content.

The Constitution forbids a statute that would punish a dealer for innocently selling pornographic material. The statute must require knowledge—"scienter." *Smith v. California*, 1959, 361 U.S. 147, 80 S. Ct. 215. But, if a statute does so, the evidence is sufficient to justify conviction if it shows the defendant to be "aware of the character of the material" and his action to be "not innocent but calculated purveyance of filth." *Mishkin v. New York*, 1966, 383 U.S. at 512, 86 S.Ct. at 965. Since we unanimously conclude that "scienter" is a requirement of the Louisiana statute, constitutional requisites are fully satisfied.

"In considering searches incident to arrest, it must be remembered," Justice White said in his dissent in *Chimel v. California*, 1969, . . . U.S. . . . , . . . , 89 S.Ct. 2034, 2050-2051, "that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights. . . . An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding."

That in my view is all that the state is required to do. It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite;¹ there should be no rule in criminal law—even by virtue of the protection accorded to freedom of speech—that every peddler of pornography is entitled to one free essay at scatology.

Never has the Supreme Court intimated such a requirement. It gave no hint of it when, without exacting any adversary hearing prior to prosecution, it upheld the conviction of a defendant under a New York statute for a sale of obscene materials to minors, in *Ginsberg v. New York*, 1968, 390 U.S. 629, 88 S.Ct. 1274, or when it upheld another conviction under the New York statute for “hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.” *Mishkin v. New York*, 1966, 383 U.S. 502, 86 S.Ct. 958. It is obviously impossible to hold a “prior adversary hearing” with respect to the offense of hiring someone to prepare an obscene book and difficult to conceive that it would be practical to hold one for the offense of publishing them. Nor is the rule this Court now adopts consonant with the conviction affirmed in *Ginzburg v. United States*, 1966, 383 U.S. 463, 86 S.Ct. 942, under an indictment charging violations of the federal obscenity statute.

In *Near v. Minnesota*, 1931, 283 U.S. 697, 716, 51 S.Ct. 625, 631, the Court said, “. . . [T]he protection even as to previous restraint is not absolutely unlimited. . . . [T]he primary requirements of decency may be enforced against obscene publications.” “The phrase, ‘prior restraint’ is

¹ See Prosser on Torts, 516 (3d ed. 1964).

² The motion picture cases are interesting applications. See, e.g., *Freedman v. Maryland*, 1965, 380 U.S. 51, 85 S.Ct. 734; *Times*

not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 1957, 354 U.S. 436, 441, 77 S.Ct. 1325, 1328.¹ But even if prior restraint is entirely reprobated, the majority opinion fails to draw the distinction between previous restraint on the right of free speech (like the seizure of a publication before it can be sold) and a criminal statute that imposes subsequent punishment on pornography, an

Film Corp. v. Chicago, 1961, 365 U.S. 43, 81 S.Ct. 391; *Interstate Circuit Inc. v. City of Dallas*, 1968, 390 U.S. 673, 88 S.Ct. 1298. In *Tyrone Inc. v. Wilkinson*, 4 Cir. 1969, 410 F.2d 639, the court held "that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie." However, the district judge "properly refused to enjoin the state court prosecution for violation of the criminal obscenity statute in the absence of a showing of bad faith enforcement of a statute unconstitutional on its face or as applied." The theatre owner was required to deliver to the prosecuting attorney upon request a copy of the movie for reasonable use in the preparation and trial of the criminal charges. This follows the views expressed in *Metzger v. Percy*, 7 Cir. 1968, 393 F.2d 202, 204, where the court affirmed an injunction ordering return of four prints of a film seized without a search warrant; the affirmed order required the theatre owner to deliver to the prosecuting attorney upon request one print of the film for use in the trial of the criminal charge. "The decisions of this Court and of the District Court do not prohibit the prosecution under the Indiana obscenity statutes."

¹The distinction has been repeatedly referred to although it has seldom been thought necessary to state it at length. But dissenting from a decision later overturned, Chief Justice Warren said in *Times Film Corp. v. Chicago*, 1961, 365 U.S. 43, 53, 81 S.Ct. 391, 397: "[T]his Court has carefully distinguished between laws establishing sundry systems of previous restraint on the right of free speech and penal laws imposing subsequent punishment on utterances and activities not within the ambit of the First Amendment protection." See also, e.g., Justice Brennan's observation in *Ginzburg, supra*, "A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use." 383 U.S. at 475, 86 S.Ct. at 949. And in *Near, supra*, the court said, "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject

activity by definition not protected by the First Amendment.⁴

Concurring in the result in *Roth* and its companion case, *Alberts v. California*, 1957, 354 U.S. 476, 77 S.Ct. 1304, Chief Justice Warren spoke in terms that are applicable here: "The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct." 354 U.S. at 497, 77 S.Ct. at 1315.

the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions." 283 U.S. at 715, 51 S.Ct. at 630. Cf. Lockhart, Kamisar and Choper, *The American Constitution*, p. 761: "Why should *anyone* have to take the risk that the Court's judgment of what is obscene will not agree with his own honest belief that it is not obscene under the evolving constitutional standards? . . . Does the current uncertainty as to the standard suggest that imposition of criminal liability except for hard core pornography is inappropriate? That the preferred way to deal with the problem may be to place the book on trial as in *Memoirs*? See Kauper, *supra*, at 71-72; Lockart & McClure (1960) at 106-07."

⁴Professor Paul A. Freund has written perceptively about the distinctions between prior restraint and subsequent punishment in the Supreme Court and *Civil Liberties*, 1951, 4 Vand. L. Rev. 533, 537. As he observes, "Certain distinctions commonly drawn between prior restraint and subsequent punishment will not bear analysis." But he writes that there are also real differences between the two and concludes, in language quoted with approval in *Kingsley Books, supra*, "In sum, it will hardly do to place 'prior restraint' in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances." 4 Vand. L. Rev. at 539. See also Schwartz, *A Commentary on the Constitution of the United States, Part III, Rights of the Person, Volume I, Sanctity, Privacy and Expression*, §450, pp. 336 et seq. (1968).

The enactment of a criminal statute is intended to deter unlawful conduct. But any possibility of some other kind of state action against the individual is likewise a possible deterrent. The faint-hearted may be discouraged from pursuing a course of conduct by the possibility of an order to appear in court. Many a man will flinch from any kind of a controversy with the state. Even the threat of facing a judge may be a potential prior restraint, and it is conceivable that some news dealers might be willing to run the risk of a fine rather than bold enough to pay the price of successfully contesting an adversary proceeding. Yet on a record that lacks evidence of any kind dealing with the psychology of individual intimidation, my brothers conclude intuitively that one restraint touches the defendant so lightly as to be lawful while the other bears so heavily as to be invalid.

Were the existence of any touch of "prior restraint" the tincture by which state conduct is stained unconstitutional, then presumably the existence of the possibility of an adversary hearing, or (in other contexts) the possibility of prosecution for criminal libel, or of the filing of a civil suit for libel, would color unlawful all government action in these areas. And it would mar the arrest, without a prior proceeding, of a defendant for violating the federal statute prohibiting the knowing use of the mails to transmit "every obscene, lewd, lascivious, indecent, filthy or vile article," 18 U.S.C. §1461; as well as for transgressing the law that makes it a crime to mail matter containing "upon the envelope or outside cover . . . language of an indecent, lewd, lascivious or obscene character," even though the contents are "otherwiseailable by law"; 18 U.S.C. §1463; and the provision that makes it a crime

knowingly to import such material, 18 U.S.C. §1462. And such a requirement would apparently dye entirely unconstitutional 18 U.S.C. §1464, which makes it a criminal offense to utter "any obscene, indecent, or profane language by means of radio communication," because there would be no way to have a prior adversary hearing with respect to such "one shot" utterances unless all radio communication were required to be previously transcribed.⁵

The procedure suggested in the majority opinion comes almost full cycle to the censorship condemned in *Near, supra*, in 1931. "This is the essence of censorship," the court there said, with regard to a procedure whereby the state might bring a publisher before a judge on a charge of conducting the business of publishing obscene, lewd and licentious matter and obtain an injunction against further publication.

Despite the allegations of the petition, the court does not find that the defendants have harassed the plaintiffs, or that they have employed threats of prosecution to chill freedom of speech, or that there has been any other kind of misuse of the processes of state criminal justice. If there were proof of such facts, a different case would be presented. But the court, in action from which I do not dissent, refrains even from issuing an injunction. It merely declares the state's procedure constitutionally infirm on its face.

⁵ A question might be raised whether a warrant could properly be issued to seize pornography for use as evidence in such a "prior hearing," for a search warrant may be issued only for property "designed or intended for use or which is or has been used as a means of committing a criminal offense," Rule 41(b), Federal Rules of Criminal Procedure, or for evidence that a crime has been committed. *Warden v. Hayden*, 1967, 387 U.S. 294, 87 S.Ct. 1642.

When the Supreme Court, only a few weeks ago, held it unconstitutional to make private possession of obscene material a crime it said, "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Stanley v. Georgia*, 1969, U.S., 89 S.Ct. 1243, 1249. If this be true, the Constitution does not deny the state the power to arrest a person on a charge of selling pornography that appeals only to prurency, affronts all community standards, and completely lacks social worth without first haling that person into court to caution him that what he is doing is unlawful. From the proposition that this is what the Constitution means I must dissent."

ALVIN B. RUBIN,

United States District Judge.

New Orleans, Louisiana

September 3, 1969

⁶If the arrest had been held valid, it would have been necessary to consider the validity of the seizures made of some of the material involved under the doctrine of the *Chimel* case, *supra*, and the possible applicability of the rule of that case to seizures made before it was decided. It would then also have been necessary to consider whether those particular publications obtained properly (for example by lawful seizure or by purchase) are protected by the First Amendment.

But since the majority does not reach these questions, it is needless to comment on them. Indeed, these might be matters for a single judge to decide after resolution of the questions involving constitutionality of the state statute.

Nor is there need for comment about the nature of the publications. Although they are unfit for publication in the published reports, I attach for the record xerox copies of the covers of five of them. The covers alone show that they proclaim the "leer of the sensualist," *Ginzburg*, 383 U.S. at 468, and that no dealer could fail to recognize the likely pornography of the contents.

APPENDIX "C".

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION.**

No. 69-322 CIVIL ACTION SECTION D.

**AUGUST M. LEDESMA, JR., HAROLD J. SPEISS,
and LAWRENCE P. PITTMAN,**

versus

**LEANDER H. PEREZ, JR., Individually and as Dis-
trict Attorney For the Twenty-Fifth Judicial Dis-
trict, State of Louisiana; LOUIS REICHART, In-
dividually and as Captain in the Sheriff's Office in
the Parish of St. Bernard, State of Louisiana;
GEORGE BETHEA, Individually and as a Deputy
in the Sheriff's Office in the Parish of St. Bernard,
State of Louisiana; and EARL WENDLING, Indi-
vidually and as a Deputy in the Sheriff's Office in
the Parish of St. Bernard, State of Louisiana.**

JUDGMENT.

For the written reasons of the Court on file herein, and
considering the direction of the Court as to the entry of
judgment;

IT IS ORDERED AND ADJUDGED that there be
judgment decreeing:

1. That all seized materials be returned, instanter, by the defendants to those plaintiffs from whom they were seized,

2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,

3. That the preliminary and permanent injunctions prayed for be denied,

4. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional, and

5. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper.

New Orleans, Louisiana, this 13th day of August 1969.

A. DALLAM O'BRIEN, JR.,

(A. Dallam O'Brien, Jr.),

Clerk.

Aug. 14, 1969.

Approved as to form:

EDW. J. BOYLE, SR.,

United States District Judge.

PROOF OF SERVICE.

I, Charles H. Livaudais, Attorney for Appellants herein, hereby certify that I served a copy of the foregoing Jurisdictional Statement, and its appendices on Appellees herein by mailing same, postage prepaid, to their counsel of record, Jack Peebles, 323 West William David Parkway, Metairie, Louisiana 70005, prior to the docketing of this appeal in the United States Supreme Court.

CHARLES H. LIVAUDAIS,
Attorney for Appellants.

FILE COPY

FILED
AUG 12 1970

E. ROBERT SEEVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

No. 60

LEANDER H. PEREZ, JR., LOUIS REICHART,
GEORGE BETHEA, and EARL WENDLING,
Appellants,

versus

AUGUST M. LEDESMA, JR., HAROLD J. SPEISS,
and LAWRENCE P. PITTMAN,
Appellees.

On Appeal from the United States District Court,
Eastern District of Louisiana, New Orleans Division

ORIGINAL BRIEF ON BEHALF OF APPELLANTS

CHARLES H. LIVAUDAIS,
Attorney for Appellants,
2006 Packenham Drive,
Chalmette, Louisiana 70043.

Of Counsel:
ROBERT J. KLEES,
Attorney at Law,
Chalmette, Louisiana.
August 13, 1970

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	4
Questions Presented	4
Statement of the Case	5
 Arguments	
I. Obscenity is not within the area of Constitutionally Protected Speech Or Press	7
II. A "Prior Judicial Adversary Hearing" is not a necessary constitutional prerequisite to arrest and prosecution in obscenity cases	10
III. The Three Judge Court erred in granting the relief in Paragraphs 1 and 2 of the Judgment of August 14th, 1969	19
IV. It was not an appropriate exercise of discretion for the Three Judge Court to declare St. Bernard Parish Ordinance 21 - 69 unconstitutional	25
Conclusion	27

TABLE OF AUTHORITIES

Cases:

A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L Ed. 2d 809, (1964)	8, 14, 15
Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304, 1 L Ed. 2d 1498 (1957)	8, 11, 12, 13, 14

II

AUTHORITIES (Continued)

	Page
Bantam Books v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L Ed. 2d 584 (1963)	8, 13, 18
Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L Ed. 2d 182, reh den 391 U.S. 971, 88 S. Ct. 1335, 20 L Ed. 2d 182 (1968)	22, 23, 24
Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L Ed. 2d 685 (1969)	15
Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L Ed. 2d 22 (1965)	22, 23, 24
Douglas v. City of Jeannette, 319 U.S. 157, 87 L Ed. 1324, 63 S. Ct. 877	23, 26, 27
Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L Ed. 2d 947 (1968)	25
Florida Lime v. Jacobson, 362 U.S. 73, 80 S. Ct. 568, 4 L Ed. 2d 568 (1960)	25
Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L Ed. 2d 649 (1965)	18
Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L Ed. 2d 195, reh den 391, 88 S. Ct. 2029, 20 L. Ed. 2d 887 (1968)	8, 14, 16
Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L Ed. 2d 31, reh den 384 U.S. 934, 86 S. Ct. 1440, 16 L Ed. 2d 536 (1968)	8, 14, 16
Golden v. Zwickler, 394 U.S. 103, 89 S. Ct. 956, 22 L Ed. 2d 113 (1969)	26
Holden v. Arnebergh, 394 U.S. 102, 89 S. Ct. 926, 22 L Ed. 2d 112 (1969)	8, 14

III AUTHORITIES (Continued)

	Page
Kingsley Books v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L Ed. 2d 1469 (1957)	8, 11, 12, 14, 15, 18
Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708, 6 L Ed. 2d 1127 (1961)	8, 14, 15
Milky Way Productions v. Leary, 397 U.S. 98, 90 S. Ct. 817, 25 L. Ed. 2d 78 (Feb. 27, 1970)	9, 10, 16, 22, 24, 25
Mishkin v. New York, 383 U.S. 502, 86 Sup. Ct. 598, 16 L Ed. 2d 56, reh den 384 U.S. 934, 86 S. Ct. 1440, 16 L Ed. 2d 535, (1966)	8, 13, 14, 16
Monique Van Cleef v. New Jersey, 395 U.S. 814, 89 S. Ct. 2051, 23 L Ed. 2d 728 (1969)	15
Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L Ed. 1357 (1931)	11, 17, 18
New York Feed Company v. Leary, 397 U.S. 98, 90 S. Ct. 817, 25 L Ed. 2d 78 (Feb. 27, 1970)	8, 10, 16, 22, 24
Railroad Com. of California v. Pacific Gas & E. Co., 302 U.S. 388, 391, 82 L Ed. 319, 321, 58 S. Ct. 334	26
Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L Ed. 2d 205 (1959)	17
Sterling v. Constantin, 287 U.S. 378, 393, 394, 77 L. Ed. 375, 382, 383, 53 S. Ct. 190	26
Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L Ed. 2d 1498 (1957)	8, 12, 13, 14, 21

IV AUTHORITIES (Continued)

	Page
United States v. Georgia Public Service Commis- sion, supra, 371 U.S. 285, 287, 288	26
Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L Ed. 2d 179, reh den 382 U.S. 873, 86 S. Ct. 17, 15 L Ed. 2d 114 (1965)	25
Zwicker v. Boll, 391 U.S. 353, 88 S. Ct. 1666, 20 L Ed. 2d 642 (1968)	26
STATUTES:	
Louisiana Revised Statutes, Title 14, Section 106	2, 4, 5, 6, 7, 21
United States Code:	
Title 42, Section 1983	2, 6
Title 28, Sections 1253, 1331, 1343, 2201, 2283	2, 3, 4, 6, 19, 22, 24
ORDINANCES:	
St. Bernard Parish Ordinance 21-60	2, 3, 5, 6, 7, 25
OTHER.	
Wright, Federal Courts 164 (1963)	25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 60

LEANDER H. PEREZ, JR., LOUIS REICHART,
GEORGE BETHEA, and EARL WENDLING,
Appellants,
versus

AUGUST M. LEDESMA, JR., HAROLD J. SPEISS,
and LAWRENCE P. PITTMAN,
Appellees.

On Appeal from the United States District Court,
Eastern District of Louisiana, New Orleans Division

ORIGINAL BRIEF ON BEHALF OF APPELLANTS

Appellants appeal herein from the Judgment of a Three Judge Federal Court in the United States District Court for the Eastern District of Louisiana, New Orleans Division, which held, in a 2 to 1 decision, that although the Louisiana Criminal Obscenity Statute is Constitutional, arrests and prosecutions thereunder for sale of, or possession with intent to sell, obscene materials and publications, are invalid for lack of a judicial adversary hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms of the State Statute. Appellants submit that a judicial adversary hearing is not required

prior to arrest and prosecution of a person under the State Statute.

THE OPINIONS BELOW

The Majority and Dissenting Opinion of the Three Judge Court of the United States District Court for the Eastern District of Louisiana, New Orleans Division, are reported at 304 F. Supp. 662, and appear in the Appendix at pp. 83 to 118.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This action was instituted by Appellees in the District Court for the Eastern District of Louisiana, New Orleans Division, under 42 U.S.C. 1983 and 28 U.S.C. 1331, 1343 and 2201, to enjoin the prosecution of Appellee August M. Ledesma, Jr. in the 25th Judicial District Court for the Parish of St. Bernard, State of Louisiana; to declare unconstitutional Louisiana Revised Statute 14:106 (Obscenity) and St. Bernard Parish Ordinance 21-60; and for additional injunctive relief, and damages for appellees in the sum of \$30,000.00 each.

On July 14, 1969, two members of the Three Judge Court rendered an opinion holding that Louisiana Revised Statute 14:106 (Obscenity) is Constitutional, but that no arrest or prosecution thereunder can be made for crimes involving obscene materials or publications unless there has been a judicial adversary hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms

of the State Statute. The Court further refused to grant injunctions as to the pending prosecutions of Appellee Ledesma in the State Court, or as to future arrests and prosecutions under the State Statute, but nevertheless held that Appellants could not "in good faith" continue the pending prosecutions, or effect any future arrests or prosecutions under the State Statute. The Court also ordered the return of all seized materials, instantler, and the suppression of said materials in any pending or future prosecutions, and declared St. Bernard Parish Ordinance 21-60 to be unconstitutional.

The Dissenting Opinion of the Three Judge Court held that a Prior Judicial Adversary Hearing is not necessary in the enforcement of the State Statute, and that the Federal Court should not interfere with the State prosecutions.

Judgment was entered into the record on August 13, 1969. A Notice of Appeal to this Court was filed in the United States District Court, Eastern District of Louisiana, New Orleans Division on September 12, 1969.

Jurisdiction was postponed herein on June 29th, 1970, to the hearing of the case on the merits.

The Jurisdiction of this Court to review the decision of the Three Judge Court on direct appeal is conferred by 28 U.S.C. 1253.

STATUTES INVOLVED

Involved herein are Louisiana Revised Statutes, Title 14, Section 6 (printed verbatim at pp. 99 to 101 of the Appendix); St. Bernard Parish Ordinance No. 21-69 (printed verbatim at pp. 102 to 106 of the Appendix); and Section 2283 of Title 28 of the United States Code (printed verbatim at p. 19, *infra*).

QUESTION PRESENTED BY THE APPEAL

In a State Criminal Prosecution under a valid and Constitutional State Statute relative to obscene materials and publications, is it necessary that there be a Judicial Adversary Hearing, prior to arrest and prosecution of the defendant, to determine whether or not the materials and publications are obscene under the terms of the State Statute?

QUESTIONS PRESENTED BY THE COURT

In addition to the question presented in the Jurisdictional Statement, this Court requested that the parties brief and argue the following:

I.

Was it an appropriate exercise of discretion for the Three Judge Court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969, in view of the pendency of the State prosecution charging violation of Louisiana Revised Statutes 14:106?

II.

Was it an appropriate exercise of discretion for the Three Judge Court in paragraph 4 of said judgment to declare the St. Bernard Parish Ordinance No. 21-69 unconstitutional?

STATEMENT OF THE FACTS OF THE CASE

On January 27, 1969, Appellants Reichart, Bethea and Wendling, law officers of the St. Bernard Parish Sheriff's Office, arrested Appellee Ledesma at the Broad-Bruxelles Seafood and News Center No. 3 at Arabi in St. Bernard Parish, Louisiana and booked him with violation of Louisiana Revised Statute Title 14:106, and St. Bernard Parish Police Jury Ordinance 21-60, relative to obscenity. Immediately prior to the arrest Appellant Wendling had purchased two publications from Appellee Ledesma, namely: One issue of Rapture Magazine (\$2.00) and one issue of Naked Films Magazine (\$2.50). Appellant Reichart, also immediately prior to the arrest, had purchased one issue of Nudist Adventure Magazine (\$2.50), and one issue of National Climax newspaper. Incidental to the arrest Appellants took as evidence from Appellee's shelves thirty-five (35) publications and four (4) decks of playing cards, the originals of which have been transported to the Clerk of this Court with the Record transmitted from the District Court from which this appeal was taken.

Four Bills of Information were filed against Ledesma in the 25th Judicial District Court for the Parish of

St. Bernard, State of Louisiana, by Appellant Perez, District Attorney for the said 25th Judicial District, said Bills being based upon Ledesma's possession and exhibition of the aforementioned publications and playing cards. Subsequently, Appellant Perez entered a Nolle Prosequi in each of the Bills of Information relative to Violations of the St. Bernard Parish Police Jury Ordinance. The remaining two cases relative to Violations of the Louisiana State Statute are pending trial in the State Court. Appellees Ledesma, Speiss and Pittman, allegedly partners in the operation of the Broad-Bruxelles Seafood and News Center No. 3, were at no time prohibited from actively engaging in their business of selling publications, food and other items at their establishment and suffered no loss of business or income as a result of the police actions.

On February 17, 1969, Appellees filed a Complaint in the District Court for the Eastern District of Louisiana, New Orleans Division under 42 U.S.C. 1983 and 28 U.S.C. 1331, 1343 and 2201, seeking to enjoin the above prosecution of Appellee Ledesma in the State Court; to declare unconstitutional Louisiana Revised Statute 14:106 (Obscenity) and St. Bernard Parish Ordinance 21-60, and to enjoin any future arrests or prosecutions thereunder; and for additional injunctive relief, and damages for Appellees in the sum of \$30,000.00 each. A Three Judge Court was appointed to hear the matter, and after a hearing on all matters except damages two members of the Three Judge Court rendered an opinion holding that Louisiana Revised Statute 14:106 (Obscenity) is Constitutional, but that no arrest or prosecution thereunder can be made for crimes in-

volving obscene materials or publications unless there has been a Judicial Adversary Hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms of the State Statute. The Court further refused to grant Injunctions as to the pending prosecutions of Ledesma in the State Court, or as to future arrests and prosecutions under the State Statute, but nevertheless held that Appellants could not "in good faith" continue the pending prosecutions, or effect any future arrests or prosecutions under the State Statute. The Court also ordered the return of all seized materials, instantler, and the suppression of said materials in any pending or future prosecutions, and declared St. Bernard Parish Ordinance 21-60 to be unconstitutional. The Dissenting Opinion of the Three Judge Court held that a Prior Judicial Adversary Hearing is not necessary in the enforcement of the State Statute, and that the Federal Court should not interfere with the State prosecutions. It is from that portion of the Majority Opinion requiring a Prior Judicial Adversary Hearing in the enforcement of Louisiana Revised Statute 14:106 (Obscenity) that this appeal was taken.

ARGUMENT

I.

OBSCENITY IS NOT WITHIN THE AREA OF CONSTITUTIONALLY PROTECTED SPEECH OR PRESS, AND BOTH THE STATES AND FEDERAL GOVERNMENT MAY TAKE PROPER STEPS WITHIN CONSTITUTIONAL SAFEGUARDS TO PREVENT

THE DISSEMINATION OF OBSCENE MATERIALS INTO SOCIETY AND TO PUNISH THOSE GUILTY OF SO DOING

The above principle of law has been firmly entrenched in the jurisprudence of this Honorable Court.

- Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L Ed. 2d 1498 (1957);
- Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304, 1 L Ed. 2d 1498 (1957);
- Kingsley Books v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L Ed. 2d 1469 (1957);
- Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708, 6 L Ed. 2d 1127 (1961);
- Bantam Books v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L Ed. 2d 584 (1963);
- A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L Ed. 2d 809, (1964);
- Mishkin v. New York, 383 U.S. 502, 86 Sup. Ct. 598, 16 L Ed. 2d 56, reh den 384 U.S. 934, 86 S. Ct. 1440, 16 L Ed. 2d 535, (1966);
- Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L Ed 2d 31, reh den 384 U.S. 934, 86 S. Ct. 1440, 16 L Ed. 2d 536 (1966);
- Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L Ed. 2d 195, reh den 391 U.S. 971, 88 S. Ct. 2029, 20 L Ed. 2d 887 (1968);
- Holden v. Arnebergh, 394 U.S. 102, 89 S. Ct. 926, 22 L Ed. 2d 112 (1969);
- New York Feed Company v. Leary, 397 U.S.

98, 90 S. Ct. 817, 25 L Ed. 2d 78 (Feb. 27, 1970);

Milky Way Productions v. Leary, 397 U.S. 98, 90 S. Ct. 817, 25 L Ed. 2d 78 (Feb. 27, 1970).

The two paramount issues in cases of this nature brought before this Court have been: 1) What is the proper *definition* of "obscenity"?; and 2) What *procedures* are constitutionally available to the States and the Federal Government in preventing the dissemination of obscene materials into society and in imposing punishment upon those guilty of so doing?

In our case now before this Honorable Court the major issue involves the *Procedure* used in a *criminal* prosecution of a person charged under a valid and Constitutional State Statute relative to obscene publications.

Appellees contend, and the three Judge Court below has held in its 2 to 1 decision rendered herein on July 14th, 1969 (see appendix pp 88 to 90), that although an arrest and prosecution relative to obscene publications is valid and within Constitutional safeguards in all other respects, the arrests are nevertheless "... invalid for want of a prior adversary judicial determination of obscenity ... (and) ... the prosecutions should be effectively terminated." (see appendix pp 96 to 97).

It is from this erroneous conclusion of law that this Appeal has been taken.

II.

IN A STATE CRIMINAL PROSECUTION UNDER A VALID AND CONSTITUTIONAL STATE STATUTE RELATIVE TO OBSCENE MATERIALS AND PUBLICATIONS, IT IS NOT NECESSARY THAT THERE BE A JUDICIAL ADVERSARY HEARING, PRIOR TO ARREST AND PROSECUTION OF THE DEFENDANT, TO DETERMINE WHETHER OR NOT THE MATERIALS AND PUBLICATIONS ARE OBSCENE UNDER THE TERMS OF THE STATE STATUTE

This Honorable Court has never held that there must be a Prior Adversary Judicial Hearing in State criminal prosecutions relative to obscene publications, as dictated by the majority of the three Judge Court below.

To the contrary, this Court has recently affirmatively indicated in the cases of *New York Feed Company v. Leary* and *Milky Way Productions v. Leary*, supra, decided February 27th, 1970, that such a novel procedure is *not* required in criminal prosecutions such as the one involved herein.

Even prior to the decisions in the *New York Feed Company* and *Milky Way Productions* cases, supra, this Court had consistently indicated that the conventional course of criminal procedure with its many constitutional safeguards, is an acceptable, and possibly

preferable, method available to the States in cases involving obscene publications.

In *Kingsley Books v. Brown*, supra, 354 U.S. 436, 437, the primary question was whether or not the State of New York could supplement "the existing conventional criminal provision dealing with pornography by authorizing ... a 'limited injunctive remedy' ...", it being conceded therein that the conventional criminal procedures had theretofore provided adequate safeguards.

"In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' (citing *Near v. Minnesota*, 283 U.S. 697, 716). And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts v. California*, decided this day (1 L.Ed2d 1498). The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of Section 22-a." *Kingsley Books v. Brown*, 354 U.S. 436, 440, 441.

Thus, this Court in *Kingsley* affirmatively took judicial cognizance of the fact that the conventional course of criminal procedure was a constitutionally acceptable method of enforcing the requirements of decency against obscene publications, taking special

note of the case of *Alberts v. California*, supra, decided that same day, and indicating further that *extraordinary* protections must be imposed *only* when the States take steps to "*supplement the existing conventional criminal provision(s) dealing with pornography.*"

In the consolidated cases of *Roth v. United States* and *Alberts v. California*, supra; in which this Court affirmed both convictions relative to obscene materials, the conventional course of criminal procedure had been followed, and there had been no Judicial Adversary Hearing to determine the obscene nature of the books prior to arrest and prosecution. In those cases, (354 U.S. 476, at p. 492), this Court concluded that:

"In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited."

In a concurring opinion in the *Roth* and *Alberts* cases, supra, Mr. Chief Justice Warren reaffirmed his trust in the ordinary course of criminal procedure in dealing with cases involving obscene publications, just as he did in his dissenting opinion in the *Kingsley Books* case, supra (354 U.S. 436, at pp. 445 et seq.):

"It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture."

Roth v. United States, and *Alberts v. California*, 354 U.S. 476 at p. 495.

In his concurring opinion in the *Alberts* case, *supra*, 354 U.S. 476 at pp. 502 et. seq., Mr. Justice Harlan noted that the course of criminal prosecution of *Alberts* did not violate the Due Process Clause of the Constitution:

"It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to 'deprave or corrupt' a reader."

In *Bantam Books v. Sullivan*, *supra*, 372 U.S. 58 at pp. 69, 70, this Court again recognized the safeguards inherent in the conventional course of criminal procedure in obscenity cases:

"In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process."

In his concurring opinion in the *Bantam Books* case, *supra*, 372 U.S. 58 at p. 75, Mr. Justice Clark indicated his preference for "prosecution" as the better method of enforcing "the State's criminal regulations of obscenity."

In the case of *Mishkin v. New York*, *supra*, this Court affirmed *Mishkin's* conviction under a state obscenity statute, where there had been no "Prior Ju-

dicial Adversary Hearing." The majority opinion therein noted — as had Mr. Chief Justice Warren in his opinions in the *Roth*, *Alberts* and *Kingsley Books* cases, *supra* — that it is the *man*, not the publications, that is on trial in a criminal prosecution relative to obscene publications:

"Appellant was not prosecuted for anything he *said or believed*, but for *what he did*, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books."

Mishkin v. New York, 383 U.S. 502 at pp. 504, 505.

Other decisions confirmed by this Court in which the defendants had been convicted in criminal prosecutions using conventional criminal procedures, and in which there were no "Prior Judicial Adversary Hearings", are:

Ginzburg v. United States, *supra*;

Ginsberg v. New York, *supra*;

Holden v. Arnebergh, *supra*.

The majority of the Three Judge Court below, in reaching its decision, relied most heavily upon this Court's holdings in the cases of *Marcus v. Search Warrant*, *supra*, and *A Quantity of Copies of Books v. Kansas*, *supra*.

However, a study of those two cases reveals that neither involved a *criminal* prosecution, but rather involved *civil* procedures designed to seize and destroy

allegedly obscene publications, and which civil procedures were *supplemental* to "the existing conventional criminal provision(s) dealing with pornography . . ." (*Kingsley Books v. Brown*, *supra*), and thus warranted the *extraordinary* protection of a "Prior Judicial Adversary Hearing", said "Hearing" being designed to prevent *unlawful search and seizure* of publications.

In a criminal prosecution for obscenity the search for and seizure of evidence incidental thereto is controlled by the stringent constitutional safeguards inherent in our entire system of criminal justice. *Monique Van Cleef v. New Jersey*, 395 U.S. 814, 89 S. Ct. 2051, 23 L. Ed. 2d 728 (1969); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L. Ed. 2d 685 (1969). Thus the extraordinary protection against unlawful search and seizure required by *Marcus* and *A Quantity of Copies of Books* has never been held necessary by this Court in cases involving criminal prosecutions relative to obscene publications.

Although this Honorable Court has never in its own words decreed that "In a State Criminal Prosecution Under a Valid and Constitutional State Statute Relative To Obscene Materials And Publications, It is Not Necessary That There Be A Judicial Adversary Hearing, Prior To Arrest and Prosecution Of The Defendant, To Determine Whether Or Not The Materials and Publications Are Obscene Under the Terms Of The State Statute", It has nevertheless affirmatively indicated that such is the case, by Summarily Affirming the Judgments of the Three Judge Court in the consolidated

cases of *New York Feed Company v. Leary* and *Milky Way Productions v. Leary*, *supra*.

The decision of the Three Judge Court therein reported at 305 F. Supp. 288, at pp. 296-297, had the following to say about the necessity of a "Prior Judicial Adversary Hearing" in criminal prosecutions involving obscene publications:

"... what plaintiffs propose is indeed a relative "novelty," ...

"a 'prior restraint' is also effected, plaintiffs say, when arrests are made — particularly multiple arrests for promoting the same publication — because this inhibits others from continuing to distribute the materials. And so, the argument concludes, there must be an adversary hearing and judicial determination preceding the inception of the criminal process ...

"It is of interest in this connection, if by no means decisive, that plaintiffs' theory, if accepted, would have invalidated both federal and state convictions under obscenity statutes which have in the recent past been upheld by the Supreme Court, *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195 (1968); *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966). A point of greater importance, both as

a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the 'chill' or the 'prior restraint' against which they contend . . .

"The result, at least in terms of history, is to avoid any traditional form of 'prior restraint' because the *first overt impact* upon the allegedly protected area comes at a time when all the protections and favorable presumptions of the criminal process are available to the defendant. Cf. *Near v. Minnesota*, 283 U.S. 697, 713-714, 51 S.Ct. 625, 75 L. Ed. 1357 (1931).

"This is not to blink at the undeniable fact that arrests and prosecutions are likely to deter activities of the kind against which they are directed. The very existence of criminal sanctions for forms of expression, especially when the standards of liability are such vexed questions at the highest judicial levels, must have some appreciable tendency of the same type. See *Smith v. California*, 361 U.S. 147, 154-155, 80 S.Ct. 215, 4 L. Ed2d 205 (1959). The point remains that the inhibitions are not avoided by the new procedure plaintiffs want; they are, if anything pushed back to an earlier time of open contest when the burden of litigation and a species of readier "defeat" are likely to work their deterrent effects.

"It is inappropriate, we think, to 'weigh' (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the departure they urge are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. *The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity.* See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69-70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Id.* at 72-73, 83 S.Ct. at 640-641 (Douglas, J., concurring); *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-443, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957); *Near v. Minnesota*, 283 U.S. 697, 713-715, 51 S.Ct. 625, 75 L. Ed. 1357 (1931). *Bantam Books, supra*, upon which plaintiffs rely, reminds us specifically that procedures short of prosecution, intended as potential substitutes, may be less acceptable than the standard proceeding that begins with complaint, information or indictment as the first, non-adversary determination.

"At any rate, we find no warrant in the First Amendment or the cases that give it full mean-

ing for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal procedures affecting obscenity cases." (emphasis added)

Thus it is evident that the majority of the Three Judge Court below erred in dictating the necessity of a "Prior Judicial Adversary Hearing" in cases involving criminal prosecutions relative to obscene publications, and that this Honorable Court should now enter judgment rectifying said error.

III.

IT WAS NOT AN APPROPRIATE EXERCISE OF DISCRETION FOR THE THREE JUDGE COURT TO GRANT THE RELIEF IN PARAGRAPHS 1 AND 2 OF THE JUDGMENT OF AUGUST 14th, 1969, IN VIEW OF THE PENDENCY OF THE STATE PROSECUTION CHARGING VIOLATION OF REVISED STATUTES 14:106.

Counsel herein were specifically requested by this Court to brief and argue the above.

Section 2283 of title 28 of the United States Code provides that:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Con-

gress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It is submitted that it was partially in view of the above that the Three Judge Court below *alleged* that it was not issuing the Injunctive relief requested, when in fact the Decision therein had all the practical force, impact and effect of an Injunction, to wit:

- (a) by dictating therein that the prosecuting attorneys could not "in good faith" continue pending prosecutions, or institute future prosecutions, (see Appendix, p. 97); and
- (b) by rendering Judgment which Ordered and Adjudged
 - "(1) That all seized materials be returned, instantler, by the defendants to those plaintiffs from whom they were seized," and
 - "(2) That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs," (see Appendix p. 107).

What better way is there to "enjoin" a prosecution then to deprive the prosecutor of his evidence, and hang the threat over his head that he will be acting in "bad faith" — and thus submit himself to possible civil damages, while possibly giving cause for a "legal injunction" to issue — if he continues the pending prosecution.

It is significant to note at this stage the following:

1. There was only one arrest made in this case — that of Ledesma of January 27, 1969;
2. There was no illegal or “massive” search and seizure involved, and the Court below found that only “forty-five publications and a deck of playing cards” were seized incidental to the arrest by the police officers who left “more than three hundred similar publications” in the store (see Appendix, p. 86);
3. Ledesma suffered no loss of business or income, and suffered no irreparable injury; Ledesma is not a publisher, artist, photographer, or author, but, rather, borrowing the words of Mr. Chief Justice Warren, (concurring opinion, *Roth v. United States*, supra, 354 U.S. 476 at pp. 495, 496), he is a person “. . . engaged in the business of purveying textual or graphic matter openly advertised to appeal to the exotic interest of (his) customers. (He was) plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect.”
5. There was no allegation or finding of a lack of available State remedies herein;
6. The Court below found that the sections of the Louisiana Revised Statute involved herein (LSA — R.S. 14-106) “satisfy con-

stitutional requirements." (see Appendix, p 93); and

7. As noted in Judge Rubin's dissenting opinion (see Appendix, pp 108 to 118, at p. 116) . . . "the court (did) not find that the defendants (Perez, et al) have harassed the plaintiffs (Ledesma, et al), or that they have employed threats of prosecution to chill freedom of speech, or that there has been any other kind of misuse of the process of state criminal justice."

Considering the above, The Three Judge Court below should not have interfered with the state prosecutions, pending or future, in view of 28 U.S.C. 2283, *supra*, and the dictates of *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed 2d 22 (1965), *Cameron v. Johnson*, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed 2d 182, reh den 391 U.S. 971, 88 S. Ct. 1335, 20 L. Ed 2d 182 (1968), *New York Feed v. Leary*, *supra*, and *Milky Way Productions v. Leary*, *supra*.

"... the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is particularly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to

justify a disruption of orderly state proceedings. (citing *Douglas v. City of Jeannette*, 319 U.S. 157, 87 L. Ed. 1324, 63 S. Ct. 877)." *Domkowski v. Pfister*, supra, 380 U.S. 479, at pp. 484, 485.

In *Cameron v. Johnson*, supra, this Court held that there must be a showing of "special circumstances" beyond the injury to warrant Federal interference with a State's good-faith administration of its criminal laws, and that there must be sufficient proof of "bad-faith" prosecution, "irreparable injury" to the complainant, and inadequacy of available State remedies, none of which were found by the Three Judge Court herein.

In the original Complaint and Amended Complaint filed in the Federal District Court, Ledesma prayed:

"(4) that (the) Court issue a Preliminary and Permanent *Injunction* restraining and enjoining Defendants from ...:

(c) Retaining in their possession and not returning the books, magazines, and other publications previously seized by Defendants ..."

(emphasis added)

(see Appendix pp 16 to 17).

Since the Court specifically denied the *Injunctive* relief prayed for (see Appendix p. 107), Its Order for the return of the materials is inconsistent and illogical. Furthermore, Ledesma did not at any stage of these proceedings seek or pray for *suppression* of any materials, seized or purchased, as evidence. Nev-

ertheless, the Three Judge Court, for reasons unexplained, granted such relief (see Appendix p. 107). The result of the foregoing was to effectively "enjoin" the State's pending prosecution, the Court attempting to accomplish indirectly, that which it could not achieve directly because of the mandates of 28 U.S.C. 2283, and of the *Dombrowski*, *Cameron*, *New York Feed* and *Milky Way Productions* cases, *supra*.

Conclusive evidence of the permanent injunctive intent of the court below is its order of June 2, 1970, subsequent to the *Milky Way* and *New York Feed* cases, *supra*, denying Perez's motion to be relieved of the "prior judicial adversary hearing" requirement, and to set aside paragraphs 1 and 2 of the judgment of August 13, 1969. (see Appendix pp. 121 to 122).

The Three Judge Court was convened herein because of the prayer for Declaratory relief relative to a State Statute, and the prayer for Injunctive relief relative to a pending state prosecution. The Court, having refused to grant said Declaratory or Injunctive relief, should have held that the purposes for which it was convened had been accomplished, and that it would therefore be dissolved, as the Three Judge Court did in the *New York Feed* and *Milky Way Productions* cases, *supra*, 305 F.Supp 288, at p. 298. The Court nevertheless, erroneously chose to take additional unwarranted and unrequested action.

It is submitted that this Honorable Court should now enter judgment rectifying said error.

IV.

IT WAS NOT AN APPROPRIATE EXERCISE OF DISCRETION FOR THE THREE - JUDGE COURT IN PARAGRAPH 4 OF THE JUDGMENT OF AUGUST 14, 1969, TO DECLARE THE ST. BERNARD PARISH ORDINANCE NO. 21-69 UNCONSTITUTIONAL

Counsel herein were specifically requested by this Court to brief and argue the above.

The question of whether or not the Three Judge Court, having ruled the State Statute Constitutional, and having refused the Injunctive relief requested, should nevertheless have ruled on the Parish Ordinance, "... invites us 'to an area that 'abounds with slippery distinctions,' Wright, Federal Courts 164 (1963) ..." *Milky Way Productions v. Leary*, supra, 305 F. Supp 288, at p. 295. However, the rationale of *Milky Way Productions v. Leary*, supra, 305 F. Supp. 288 at pp 295 to 296, indicates that once three - judge jurisdiction is established on other grounds, the three - judge court may consider other issues which alone would not have warranted the convening of the three - judge court. The same rationale has been applied by this Court in the following cases:

Flast v. Cohen, 392 U.S. 83, 88 - 91, 88 S. Ct.

1942; 20 L. Ed 2d 947 (1968);

Zemel v. Rusk, 391 U.S. 1, 5 - 7, 85 S. Ct. 1271,

14 L. Ed 2d 179, reh den 382 U.S. 873, 86 S.

Ct. 17, 15 L. Ed 2d 114 (1965);

Florida Lime v. Jacobson, 362 U.S. 73, 75 - 85,

80 S. Ct. 568, 4 L. Ed 2d 568 (1960);

United States v. Georgia Public Service Commission, 371 U.S. 285, 286 - 288, 83 S. Ct. 397, 9 L. Ed 2d 317 (1963).

"So we have a clear case for convening a three - judge court. Once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three - judge court. See *Sterling v. Constantin*, 287 U. S. 378, 393, 394, 77 L. Ed 375, 382, 383, 53 S. Ct. 190; *Railroad Com. of California v. Pacific Gas & E. Co.*, 302 U.S. 388, 391, 82 L. Ed. 319, 321, 58 S. Ct. 334." *United States v. Georgia Public Service Commission*, *supra*, 371 U.S. 285, 287, 288.

Despite the above, the Three Judge Court below should have elected to take no action in reference to the St. Bernard Parish Ordinance.

Prior to the trial which led to the Judgment of August 14, 1969, a *nolle prosequi* had been entered in each of the charges against Ledesma relative to the Parish Ordinance, terminating the prosecutions thereunder.

Therefore, at the time of trial there was no "controversy of sufficient immediacy and reality to warrant a declaratory judgment." (emphasis added). *Golden v. Zwickler*, 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed 2d 113 (1969). See also: *Douglas v. Jeannette*, 319 U.S. 157, 87 L. Ed 1324 (1943); *Zwicker v. Boll*, 391 U.S. 353, 88 S. Ct. 1666, 20 L. Ed 2d 642 (1968).

Since no evidence was produced at trial to show that Ledesma, Speiss or Pittman had been threatened with, or personally feared, future prosecution under the Parish Ordinance, there was "no ground for supposing that the intervention of a federal court, in order to secure petitioner's constitutional rights, (was) either *necessary or appropriate*." (emphasis added). *Douglas v. Jeannette*, supra, 319 U.S. 157, at p. 165.

Therefore, the Three Judge Court erred in not abstaining from consideration of the constitutionality of the St. Bernard Parish Ordinance, and in declaring said Ordinance unconstitutional.

CONCLUSION

It is submitted that in a State Criminal Prosecution under a valid and Constitutional State Statute relative to obscene materials and publications, it is not necessary that there be a Judicial Adversary Hearing, prior to arrest and prosecution of the defendant, to determine whether or not the materials and publications are obscene under the terms of the State Statute.

For the foregoing reasons, there should be Judgment herein in favor of Appellants:

1. Setting aside that portion of the Decision of the Three Judge Court which dictated that no arrest or prosecution can be made under Louisiana Revised Statute 14:106 unless there has been a judicial adversary

hearing, prior to arrest, to determine whether or not the materials involved are obscene under the terms of said Statute;

2. Setting aside that portion of the Decision of the Three Judge Court which dictated that the pending prosecutions against Appellee Ledesma should be "effectively terminated";
3. Reversing and setting aside Paragraphs 1 and 2 of the Judgment, which ordered that all seized materials be returned, instant, and that the materials be suppressed as evidence in any pending or future prosecutions; and
4. Reversing and setting aside Paragraph 4 of the Judgment, which declared St. Bernard Parish Ordinance No. 21-60 unconstitutional.

Respectfully Submitted,

Attorney for Appellants
CHARLES H. LIVAUDAIS

Of Counsel:

Robert J. Klees
Attorney at Law

PROOF OF SERVICE

I, Charles H. Livaudais, attorney for Appellants herein, hereby certify that I served three copies of the foregoing Original Brief On Behalf Of Appellants, and three copies of the Single Appendix thereto, together with a copy of the statement of costs therefor, upon Appellees herein, by mailing same, postage prepaid, to their counsel of record, Jack Peebles, 323 West William David Parkway, Metairie, Louisiana 70005, prior to the filing thereof in the United States Supreme Court.

CHARLES H. LIVAUDAIS
Attorney for Appellants

**IN THE
Supreme Court of the United States
OCTOBER TERM, 1970**

No. 60

**LEANDER H. PEREZ, JR., LOUIS REICHART,
GEORGE BETHEA, and EARL WENDLING,**
Appellants,

versus

**AUGUST M. LEDESMA, JR., HAROLD J. SPEISS,
and LAWRENCE P. PITTMAN,**
Appellees.

**On Appeal from the United States District Court,
Eastern District of Louisiana, New Orleans Division**

ORIGINAL BRIEF ON BEHALF OF APPELLEES

**JACK PEEBLES,
Attorney for Appellees,
323 West William David Parkway,
Metairie, Louisiana 70005**

Of counsel:

**Stanley Fleishman
Suite 718 Max Factor Bldg.
6922 Hollywood Blvd.
Hollywood, Calif. 90028**

**Robert Eugene Smith
Suite 507
The Alex. Brown & Sons Bldg.
102 W. Pennsylvania Ave.
Towson, Md. 21204**

TABLE OF CONTENTS

	Page
Statement of Facts	1
Summary of Argument	3
I. Arrest of a News Store operator and Seizure of his magazines as evidence of obscenity by state officials in the absence of prior judicial scrutiny violates the First, Fourth, and Fourteenth Amendments to the United States Constitution	4
A. The Necessity for Judicial Scrutiny Before Seizure	4
B. The Necessity for Judicial Scrutiny Before Arrest	8
C. The Nature of and Necessity for a Prior Adversary Judicial Hearing	11
II. The Publications in Question are not Obscene as a Matter of Law. The State has no compelling interest in preventing their limited distribution (1) to adults only, (2) absent pandering, and (3) absent obtrusive display in such manner as to offend others	14
III. The three-Judge Court below properly exercised its discretion in granting the relief in paragraphs 1 and 2 of its judgment of August 14, 1969, in view of the pendency of the State prosecution charging violation of Revised Statute 14:106.	16

TABLE OF CONTENTS (Continued)

	Page
A. The Declarative Relief and Orders to Effectuate that Relief Were Proper	16
B. The Civil Rights Act is One of the Exceptions Mentioned in the Federal Anti-Injunction Statute, Since the Civil Rights Act Authorizes An Injunction And Such is "Expressly Authorized By Act of Congress	19
IV. The Three-Judge Court Below Properly Exercised Its Discretion in Granting The Relief in Paragraph 4 of the Judgment of August 14, 1969, Declaring the St. Bernard Parish Obscenity Ordinance to be Unconstitutional	22
Conclusion	23
Proof of Service	25

TABLE OF AUTHORITIES

	Page
Anti-Injunction Statute (28 U.S.C. 2283)	17, 19
Civil Rights Act (42 U.S.C. §1983)	2
Declaratory Judgments Act (28 U.S.C. §2201)	2, 17
The Dombrowski Remedy — Federal Injunctions Against State Court Proceedings Violative of Con- stitutional Rights, 21 Rutgers L. Rev. 92, 109- 113	20
<i>Zwickler v. Koota</i> , 389 U.S. 241 (1967)	3, 17
<i>Marcus v. Search Warrant of Property</i> , 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127	4
<i>Quantity of Copies of Books v. Kansas</i> , 378 U.S. 205, 84 S.Ct. 1723, 12 L. Ed. 2d 809	4, 5
<i>Morrison v. Wilson</i> , 307 F. Supp. 196 (N.E. Fla. 1969)	6
<i>Carter v. Gautier</i> , 305 F. Supp. 1098 (M.D.Ga. 1969) ..	6
<i>Delta Book Distributors, Inc. v. Cronvich</i> , 304 F.Supp. 662 (E.D. La. 1969)	6
<i>Cambist Films, Inc. v. Tribell</i> , 293 F. Supp. 407 (E.D. Ky. 1968)	6
<i>Fontaine v. Dial</i> , 303 F. Supp. 436 (W.D. Tex. 1969) ..	6

TABLE OF AUTHORITIES (Continued)

	Page
<i>Entertainment Ventures, Inc. v. Brewer</i> , 306 F. Supp. 802 (M.D. Ala. 1969)	7, 8
<i>Russ Meyer, et al v. T. Edward Austin, et al</i> (No. 69-678-CIV-J, U.S.D.C. Mid. Dist. Fla., July 22, 1970)	7
<i>Poulos v. Rucker</i> , 288 F.Supp. 305 (M.D. Ala. 1968)	7
<i>City News Center, Inc. v. Carson</i> , 209 F. Supp. 706 (M.D.Fla. 1969)	7
<i>Sokolic v. Ryan</i> , 304 F. Supp. 213 (S.D.Ga. 1969)	7
<i>Cambist Films, Inc. v. State of Illinois</i> , 292 F. Supp. 185 (N.D. Ill. 1968)	7
<i>Wilhelm v. Turner</i> , 298 F.Supp. 1335 (S.D. Iowa 1969)	7
<i>Bee See Books, Inc. v. Leary</i> , 291 F. Supp. 622 (S.D. N.Y. 1968)	7
<i>Gregory v. DiFlorio</i> , 298 F. Supp. 1360 (W.D. N.Y. 1969)	7
<i>United States v. Brown</i> , 274 F.Supp. 561 (D.D. N.Y. 1967)	7
<i>Drive In Theatres, Inc. v. Huskey</i> , 305 F. Supp. 1232 (W.D. N.C. 1969)	7

TABLE OF AUTHORITIES (Continued)

Page

<i>Leslie Tobin Imports, Inc. v. Rizzo</i> , 305 F. Supp. 1135 (E.D. Pa. 1969)	7
<i>Overstock Book Co., Inc. v. Barry</i> , 305 F. Supp. 842 (E.D. N.Y. 1969)	7
<i>Central Agency, Inc. v. Brown</i> , 306 F.Supp. 502 (N.D. Ga. 1969)	7
<i>HMH Publishing Co., Inc. v. Oldham</i> , 306 F. Supp. 495 (M.D. Fla. 1969)	7
<i>Tyrone, Inc. v. Wilkinson</i> , 294 F. Supp. 1330 (E.D. Va. 1969)	6, 7
<i>Lee Art Theatres, Inc. v. Virginia</i> , 392 U.S. 636	8
<i>Cambist Films v. Duggan</i> , 420 F. 2d 687 (3rd Cir., 1969)	6, 8
<i>Smith v. California</i> , 361 U.S. 147, 80 S. Ct. 215 (1959)	11
<i>Goodwin v. Morris</i> , 3 Judge Court, N.D. Ohio, No. C 70-19, March 18, 1970	13
<i>Bloss, et al v. Dykema</i> , October Term, 1969, No. 1347, 26 L. Ed. 2d 230	14
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969)	15
<i>Karalexis v. Byrne</i> , U.S.D.C. Mass. now on appeal as <i>Byrne v. Karalexis</i> , No. 83 O.T. 1970	15

TABLE OF AUTHORITIES (Continued)

	Page
<i>U.S.A. v. Thirty Seven Photographs</i> , U.S.D.C. Cent. Dist. Cal., CA No. 69-2242-F, 38 L.W. 2240 (1970)	15
<i>Kerotest Mfg. Co. v. C.O. Two Fire Equipment Co.</i> , 342 U.S. 180, 72 S. Ct. 219	17
<i>St. Paul Mercury Insurance Co. v. Huitt</i> , 336 F. 2d 37 (6th Circuit)	17
<i>Amalgamated Clothing v. Richman Brothers</i> , 348 U.S. 511 (1955)	19
<i>Dilworth v. Riner</i> , 343 F. 2d 226 (5th Cir. 1965)	19
<i>Leiter Minerals, Inc. v. United States</i> , 352 U.S. 220	19
<i>Strauder v. West Virginia</i> , 100 U.S. 303, 306-307	20
<i>Ex Parte Virginia</i> , 100 U.S. 339	20
<i>Monroe v. Pape</i> , 365 U.S. 167, 180	20
<i>Landry v. Daley</i> , 288 F. Supp. 200, 223 (N.D. Ill. 1968)	20
<i>Dombrowski v. Pfister</i> , 380 U.S. 479	20, 21
<i>Ware v. Nichols</i> , 266 F. Supp. 564 (N.D. Miss. 1967)	20
<i>City of Greenwood v. Peacock</i> , 384 U.S. 808	21
<i>Bethview Amusement Corp. v. Cahn</i> , 416 F. 2d 410 (1969) cert. denied 2-27-70	6
<i>Metzger v. Percy</i> , 393 F. 2d 202 (1968)	7

TABLE OF AUTHORITIES (Continued)

	Page
<i>U.S.A. v. Alexander</i> , No. 19757, decided May 22, 1970	7, 11
<i>Demich, Inc. v. John J. Ferdon</i> , et al., No. 24959, decided May 13, 1970	7
<i>Worthington v. U.S.</i> 166 F. 2d 557	8
<i>City News Center, Inc. v. Dale Carson</i> , U.S.D.C., Mid. Dist. Fla., 310 F. Supp. 1018, 1021 (1970)	12
<i>Robert Krahm v. Milton Graham</i> , U.S.D.C., Ariz., No. CIV-69-392 Phx. WEC, February 12, 1970	13
<i>Davis v. Francois</i> , 395 F. 2d 730, 732 (5th Cir., 1968) ..	18

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 60

LEANDER H. PEREZ, JR., LOUIS REICHART,
GEORGE BETHEA, and EARL WENDLING,
Appellants,

versus

AUGUST M. LEDESMA, JR., HAROLD J. SPEISS,
and LAWRENCE P. PITTMAN,
Appellees.

ORIGINAL BRIEF ON BEHALF OF APPELLEES

STATEMENT OF FACTS

Plaintiffs-Appellees are the owners and operators of a news stand in the Parish of St. Bernard, State of Louisiana. On January 27, 1969 Appellants Reichart, Bethea, and Wendling, officers in the Sheriff's Office for the Parish, entered the news stand and purchased two magazines from the adult section. After briefly reviewing the magazines at the store, they arrested Appellee Ledesma for allegedly violating State and Parish obscenity statutes. The officers then seized forty-five publications on display in the adult section of the news stand including thirty-five different titles, to be used as evidence

against Ledesma. No warrant of any kind had been applied for or obtained by the officers prior to the arrest and seizures, and no prior adversary judicial hearing on the question of the obscenity of the publications had been held prior to the arrest and seizures. No judge or magistrate had been consulted in any manner prior to the arrest and seizures. (A. 51).

According to affidavits filed by news stand owner Ledesma (A. 71) and his attorney (A. 70), which affidavits were submitted into evidence by stipulation (A. 48), the law officer in charge of the raid told Ledesma immediately after the seizure to remove the rest of the undesirable publications immediately from the premises of the news store and not display them with the implied threat of further seizures if this were not done.

The news stand owners filed an action under authority of the Civil Rights Act (42 U.S.C. §1983) and the Declaratory Judgments Act (28 U.S.C. §2201). The three-judge court below declined to grant any injunctive relief in the case (A. 96) but declared the St. Bernard Obscenity Ordinance to be unconstitutional and declared part of the State Obscenity Statute to be unconstitutional (A. 94). Both were declared to be unconstitutional on their face for overbreadth. The court below also declared unconstitutional the procedure of seizing magazines and arresting persons for selling them in the absence of an appropriate warrant and a prior adversary judicial hearing on the question of the obscenity of the publications. From this decision the St. Bernard Parish police officials have appealed.

Appellees disagree with the statement in Appellants' brief (p. 6) that Appellees "were at no time prohibited

from actively engaging in their business of selling publications, food and other items at their establishment and suffered no loss of business or income as a result of the police actions." (See Stipulation at A. 51).

SUMMARY OF ARGUMENT

1. Appellee Ledesma was illegally arrested and magazines were illegally seized from Appellees' news store because of the absolute lack of any judicial scrutiny or supervision over the seizure and arresting procedure. In the absence of an arrest warrant, search warrant, or prior adversary hearing on the question of the obscenity of the publications, inadequate procedural protection was afforded presumptively protected First Amendment materials. This is particularly true where, as here, the magazines were at a public news store so that there was no impediment of place or time to prevent the use of such reasonable protective procedure.
2. The materials seized by the police officers were substantially similar to materials recently held by this Court to be not obscene as a matter of law, and the manner of dissemination of the materials at the news store created no compelling state interest in suppressing that dissemination.
3. The court below exercised proper discretion in ordering materials seized to be returned to the newsdealers and suppressed as evidence in any criminal trial. Such orders were reasonable and necessary to affectuate the declaratory judgment of the court, and such judgment was mandated by this Court in *Zwickler v. Koota*, 389 U.S. 241 (1967). Further, the

Federal Civil Rights Act is one of the exceptions al-
luded to in the Federal Anti-Injunction Act. For the
same reasons, the court below properly declared the
St. Bernard Parish Obscenity Ordinance to be un-
constitutional.

I.

ARREST OF A NEWS STORE OPERATOR AND SEIZURE OF HIS MAGAZINES AS EVIDENCE OF OBSCENITY BY STATE OFFICIALS IN THE AB- SENCE OF PRIOR JUDICIAL SCRUTINY VIO- LATES THE FIRST, FOURTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CON- STITUTION.

The arrested Appellee in this case, August Ledesma,
was the operator of a newsstore. The newsstore was
open to the public, and girlie magazines were kept in
an area restricted to adults (A. 72-73). The St. Bernard
Parish police officials who arrested him, seized forty-
five magazines from his store, and charged him with
obscenity, did so in the absence of any judicial scrutiny
or supervision whatsoever. No arrest warrant or search
warrant was obtained, although there was no reason why
they could not have been issued if the facts warranted
it. No adversary hearing on the question of the obscenity
of the publications was afforded Ledesma. He was sim-
ply arrested and his magazines seized because St. Ber-
nard deputy sheriffs, in their wisdom, decided that the
magazines were obscene.

A. The Necessity for Judicial Scrutiny Before Seizure.

In *Marcus v. Search Warrant of Property*, 367 U.S.
717 81 S. Ct. 1708, 6 L. Ed. 2d 1127, and *Quantity
of Copies of Books v. Kansas*, 378 U.S. 205, 84 S. Ct.

1723, 12 L. Ed. 2d 809, this Court held that publications such as the magazines involved in this case are entitled to special procedural safeguards which do not apply to ordinary "contraband". These procedural safeguards, as enunciated by this Court, include the right to a prior adversary judicial hearing before seizure on the issue of obscenity and the issuance of a proper warrant which does not leave to the discretion of the police officer the decision as to what is to be seized as obscene. The two cases were civil cases in which the State sought to suppress allegedly obscene publications by forfeiture. However, this Court did not limit its holding to civil cases when it said:

"It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected that proposition in *Marcus*.

- - - - -

"For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books."

A Quantity of Copies of Books v. Kansas,
378 U.S. at 213.

Since the decisions in *Marcus* and *Quantity of Copies of Books*, six Federal Circuit Courts of Appeal have held that law enforcement officials cannot seize allegedly obscene materials in criminal cases in the absence of a prior adversary hearing on the question of the obscenity

of the material. The cases, all involving allegedly obscene movies, are:

2nd Circuit:

Bethview Amusement Corp. v. Cahn, 416 F. 2d 410 (1969) cert. denied 2-27-70 Case No. 1034.

3rd Circuit:

Cambist Films v. Duggan, 420 F. 2d 687 (1969).

4th Circuit:

Tyrone, Inc. v. Wilkinson, 410 F. 2d 639 (1969).

7th Circuit:

Metzger v. Percy, 393 F. 2d 202 (1968).

8th Circuit:

U.S.A. v. Alexander, No. 19757, decided May 22, 1970.

9th Circuit:

Demich, Inc. v. John J. Ferdon, et al, No. 24959, decided May 13, 1970.

The following decisions rendered by three-judge federal district courts empaneled pursuant to 28 U.S.C. §2281 and §2284 have held that the Constitution requires an adversary hearing to determine the question of obscenity before seizure: *Morrison v. Wilson*, 307 F. Supp. 196 (N.E.Fla. 1969) (publication); *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969) (motion picture film); *Delta Book Distributors, Inc. v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1968) (publication); *Cambist Films, Inc. v. Tribell*, 293 F. Supp. 407 (E.D. Ky. 1968) (motion picture film); *Fontaine v. Dial*, 303 F. Supp. 436 (W.D.

Tex. 1969) (motion picture film). An excellent analysis of the issues involved in this case was included in the three-judge court decision in *Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969), which held that some form of prior judicial scrutiny, though not necessarily an adversary hearing, was required prior to seizure. The latest three-judge court decision recognizing this principle was *Russ Meyer, et al v. T. Edward Austin, et al* (No. 69-678-CIV-J, U.S.D.C., Mid. Dist. Fla., July 22, 1970).

The following is a compilation of decisions rendered by United States District Courts holding that a prior adversary hearing is mandated by the Constitution in the area of First Amendment freedoms: *Poulos v. Rucker*, 288 F. Supp. 305 (M.D. Ala. 1968) (publications); *City News Center, Inc. v. Carson*, 298 F. Supp. 706 (M.D. Fla. 1969) (publication); *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969) (books, magazines and movie film); *Cambist Films, Inc. v. State of Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968) (motion picture film); *Wilhelm v. Turner*, 298 F. Supp. 1335 (S.D. Iowa 1969) (newspaper); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D. N.Y. 1968) (Rule recognized); *Gregory v. DiFlorio*, 298 F. Supp. 1360 (W.D. N.Y. 1969) (books); *United States v. Brown*, 274 F. Supp. 56 (D.D. N.Y. 1967) (magazines); *Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232 (W.D. N.C. 1969) (motion picture film); *Leslie Tobin Imports, Inc. v. Rizzo*, 305 F. Supp. 1135 (E.D. Pa. 1969) (posters and buttons); *Overstock Book Co., Inc. v. Barry*, 305 F. Supp. 842 (E.D. N.Y. 1969); (books); *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969) (motion picture film); *HMH Publishing Co., Inc. v. Oldham*, 306 F. Supp. 495 (M.D. Fla. 1969) (magazines); *Tyrone*,

Inc. v. Wilkinson, 294 F. Supp. 1330 (E.D. Va. 1969) (motion picture film).

The foregoing authorities clearly demonstrate that the First, Fourth, and Fourteenth Amendments compel more restrictive rules in cases in which seizures are related to alleged obscenity than in ordinary cases where the seizure is made incident to a lawful arrest. The Appellants argue that newsstore owner Ledesma was arrested for a misdemeanor committed in the presence of the officers, and such officers were under a duty to take possession of the existing physical evidence of the offense without a warrant or without the necessity of any type of prior adversary judicial hearing. It is incongruous to condemn, as vesting too abundant authority in the enforcing officer, a search and seizure made on an overly broad warrant, as this court did in *Lee Art Theatres, Inc. v. Virginia*, 392 U.S. 636, while permitting officers an unfettered discretion in seizures effected without a warrant under the guise of being incident to arrest. See *Cambist Films v. Duggan*, 420 F. 2d 687 (3rd Cir., 1969).

B. The Necessity for Judicial Scrutiny Before Arrest.

The Court below condemned not only the seizures but also the arrest in the absence of providing adequate protection for presumptively non-obscene materials:

"Since prior restraint upon the exercise of First amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizures and arrests, the conclusion is irresistible and logic and in law that none of these may be constitutionally un-

dertaken prior to an adversary judicial determination of obscenity." (A. 88-89)

No prior judicial scrutiny, even by way of arrest warrant, was present in this case. See e.g., *Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802 (three-judge court, N.D. Ala. 1969). There was no impediment to the St. Bernard Parish officers obtaining an arrest warrant, if the facts otherwise warranted its issuance. The news stand involved was open to the public, and the officers had previously visited it.

The Fourth Amendment is not limited to seizures of personal effects, but provides that "the right of the people to be secure in their *persons*. . . against unreasonable seizures shall not be violated," and further provides that warrants must particularly describe the "persons . . . to be seized."

Thus,

"The Fourth Amendment guarantees the right of the individual to be secure against unreasonable arrests as well as against unreasonable search of houses and seizure of papers and effects."

Worthington v. U.S., 166 F. 2d 557

A critical question before this Court is whether the arrest in this case was unreasonable because, made without a warrant or judicial scrutiny, such procedure does not adequately safeguard against the suppression of non-obscene books. This Court has held that books cannot be placed in the same category as gambling paraphernalia and other contraband for purposes of search and seizures. Yet it is not the personal effects (non-obscene books)

themselves that the Court was primarily concerned about, but the right of the public to read non-obscene books. It is submitted that the seizure of persons is as relevant to this concern as the seizure of papers and effects. Just as books are not in the same category as gambling paraphernalia, so arrests for the sale or possession of books are not in the same category as arrests for possession of gambling implements.

Certainly an arrest may present as much "danger to abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books." (A Quantity of Copies of Books, at 378 U.S. 205, 213) as seizure of the books themselves. It is submitted that the entire thrust of the cases decided by this Court in this area is that *the policeman on the beat should not be allowed to determine what is obscene or not obscene because if given this authority he can—and very likely will—obstruct the circulation of non-obscene books.* Thus the requirements for a prior adversary hearing before seizure and a search warrant. Is it any more reasonable to permit that same policeman or, in this case, a deputy sheriff from St. Bernard Parish, to pay \$2.00 for a magazine and then exercise his opinion that it is obscene by arresting the vendor? Is not the same danger to free speech present in this case as would be present if the policeman could seize the magazines without prior judicial scrutiny? He is a rare newsdealer who will continue to sell copies of a magazine after he or some fellow newsdealer has once been arrested for selling it, for such action on his part would most certainly invite arrest. To prevent such arbitrary arrests by policemen on obscenity charges, an arrest warrant should be obtained from a judicial officer. In the absence of such a warrant the arrest must be unreasonable, and thus illegal.

C. The Nature of and Necessity for a Prior Adversary Judicial Hearing.

This Court is well aware of the difficulties encountered by conscientious newsdealers in determining which materials enter that gray area in which some courts and many policemen see only obscenity. *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215 (1959). Even courts have expressed strong differences of opinion on this question. Circuit Judge Matthes of the 8th Circuit has recently pointed out:

"The assumption that there is a consensus among reasonable men as to the identity of 'hard-core pornography', therefore diminishing the danger of suppressing protected speech, may be questioned. We note that one federal district court in Mississippi found the film "The Fox" to be not obscene, while another federal district court in that state thought the film to be 'hard-core pornography.' Compare *Camise v. Douglas*, N.D. Miss. December 3, 1968, No. EC 6872-K, with *McGrew v. City of Jackson*, *supra*. We are led to assume that even more disagreement would arise among police officers and magistrates as to what constitutes 'hard-core pornography', when the decision is made without benefit of an adversary hearing. Such uncertainty can only lead to the suppression of protected speech."

U.S.A. v. Ferris J. Alexander, et al, U.S.C.A. 8th Cir., No. 19,757, decided May 22, 1970
[The quoted material is from footnote 7, page 10 of Slip Opinion]

Thus,

"The very purpose of the prior hearing is to provide the sensitive tool for determination of the expression's legitimacy before imposition of substantial restraints."

[Citations omitted]

U.S.A. v Alexander, supra,
page 10 of Slip Opinion.

The complexities involved have brought more and more lower courts to recognize that:

" . . . probable cause as to whether obscenity exists has come to be recognized as a matter of *constitutional judgment*. [Emphasis by the Court], unique in the law because of the fragile nature of the right protected, and incapable of determination by a policeman, grand jury, or judge acting *ex parte*, without a prior finding of probable cause in a judicially supervised adversary hearing."

City News Center, Inc. v. Dale Carson, U.S.D.C., Mid. Dist. Fla.,
310 F. Supp. 1018, 1021 (1970).

It was perhaps through a recognition of such facts of life in this area of the law that the court below held:

"It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the enforcement of any such regulation. However, these procedures, among others, may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity." (A. 90)

It is submitted that this Court should take this op-

portunity to affirm that the true value of the prior adversary judicial hearing in obscenity cases does not lie in its use as an adjunct to proposed criminal prosecution, but rather it is the only fair method of giving newsdealers reasonable notice as to what materials they can safely handle. This position has been adopted by some lower courts. Judge Walter E. Craig, of the United States District Court for the District of Arizona and former president of the American Bar Association, has recently held:

"This Court is in agreement with the principle adopted in *Delta, supra*, that '[t]he dissemination of a particular work, which is alleged to be obscene should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. [Citation omitted.]' at page 667 (quoting from *Cambist Films, supra*). Such a procedure should provide for immunizing alleged violators from criminal liability prior to an adversary judicial determination of the fact of obscenity. *Delta, supra*."

Robert Krahm v. Milton Graham,
U.S.D.C. Ariz., No. CIV-69-392
Phx. WEC, February 12, 1970
[Page 6 of Slip Opinion].

See also *Goodwin v. Morris*, 3 judge court, N.D. Ohio, No. C 70-19, March 18, 1970, recognizing the principle that alleged violators of obscenity laws in book and magazine cases must be immunized from criminal liability for activities occurring prior to an adversary judicial determination of the fact of obscenity. This principle of law is, it is submitted, most compelling in a fact situation such as is presented to the Court in the case

at bar. Appellee Ledesma, the operator of a newsstore, was not secreting his materials from the police. There was no factual impediment in this case to prevent the holding of such a hearing.

Because of the lack of any prior judicial scrutiny, through an arrest warrant, search warrant, or prior adversary judicial hearing on the question of the obscenity of the magazines, the arrest and seizures by Appellants violated Appellee's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution.

II.

THE PUBLICATIONS IN QUESTION ARE NOT OBSCENE AS A MATTER OF LAW. THE STATE HAS NO COMPELLING INTEREST IN PREVENTING THEIR LIMITED DISTRIBUTION (1) TO ADULTS ONLY, (2) ABSENT PANDERING, AND (3) ABSENT OBTRUSIVE DISPLAY IN SUCH MANNER AS TO OFFEND OTHERS.

The magazines at issue in this case were forwarded for this Court's observation by Appellants. Appellees submit that the magazines are substantially similar to those publications found not to be obscene by this Court as a matter of law in *Bloss, et al v. Dykema*, October Term, 1969, No. 1347, 26 L. Ed. 2d 230.

Appellee Ledesma's affidavit (A. 71), admitted into evidence below (A. 48), affirmed that at the time of Ledesma's arrest it was the policy of the newsstore to:

"(a) refuse to sell or display to juveniles any nudist or girlie magazines of the type seized by the police officers on January 27, 1969, (b) [to] display the said magazines only in a restricted

area removed from the sight of the general public, and (c) [to] refuse any lurid advertising of the said magazines. In furtherance of this policy signs restricting the display area of these magazines were kept in the store at all times and minors were forbidden to go into the area prohibited by the signs." (A. 72-73)

Photographs attached to Ledesma's affidavit and described therein (A. 73) portraying the restricted areas in which the magazines were sold were lost below after their admission into evidence (A. 74). Although Appellants have filed into the record affidavits alleging that minors were in the restricted area of the newsstore several weeks after Ledesma's arrest, there is nothing in the record from below to contradict the aforementioned facts alleged by Ledesma as true at the time of his arrest.

The President's Commission on Obscenity and Pornography has clearly demonstrated the lack of a compelling state interest in prohibiting the mere possession or consensual sale to adults of even admittedly pornographic materials. The restriction of freedom of speech through such prohibition cannot be justified in the absence of a compelling interest on the part of the state. In view of Appellee Ledesma's careful and restricted manner of dissemination of the materials prior to and at the time of his arrest, the state had no compelling interest which justified invading Ledesma's freedom of speech. Certainly there was nothing to "overbalance" his right to exercise freedom of speech in the manner in which he chose to exercise it. See: *Stanley v. Georgia*, 394 U.S. 557 (1969); *Karalexis v. Byrne*, U.S.D.C. Mass., now on appeal to this Court as *Byrne v. Karalexis*, No. 83 O.T. 1970; *U.S.A. v. Thirty Seven Photographs*,

U.S.D.C. Cent. Dist. Cal., CA No. 69-2242-F, 38 L.W. 2240 (1970)

III.

THE THREE-JUDGE COURT BELOW PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE RELIEF IN PARAGRAPHS 1 AND 2 OF ITS JUDGMENT OF AUGUST 14, 1969, IN VIEW OF THE PENDENCY OF THE STATE PROSECUTION CHARGING VIOLATION OF REVISED STATUTE 14:106.

The court below "decline[d] to grant any injunctive relief" with regard to Plaintiff-Appellee's request to enjoin Defendants from proceeding with the pending prosecution, instituting new prosecutions, or undertaking further seizures or arrests (A. 96, 97). The judgment below ordered:

"3. That the preliminary and permanent injunctions prayed for be denied," (A. 107).

The court nonetheless granted declarative relief, declaring the St. Bernard Parish Ordinance and part of the State Obscenity Statute to be unconstitutional *on their face for overbreadth* (A. 94-96). The court further declared the procedure of arresting persons and seizing magazines in the absence of a prior adversary judicial hearing to be unconstitutional (A. 90). In paragraphs 1 and 2 of its judgment the court ordered that all seized materials be returned to those from whom they were seized and suppressed as evidence in pending or future prosecutions of the news store owners (A. 97).

A. The Declarative Relief and Order to Effectuate That Relief Were Proper.

This Court has held that whether the jurisdiction to enter a declaratory judgment is to be entertained rests

in the exercise of discretion by the trial court, *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S. Ct 219, and it is established that the trial court's decision will not be disturbed on appeal in the absence of a clear showing of abuse of that discretion. *St. Paul Mercury Insurance Co. v. Huitt*, 336 F. 2d 37 (6th Circuit.)

If a trial court really is to have some discretion in the area of declaratory judgments, then certainly such discretion was properly exercised by entertaining jurisdiction in this case. There is no question but that the plaintiffs below had standing and a case or controversy existed, and there is no legislative mandate (including, by its very words, the Federal Anti-Injunction Statute, 28 U.S.C. §2283) preventing the Court from entertaining jurisdiction. To hold that the court below abused its discretion by not abstaining would really be a declaration that in fact the court below has no discretion, that the congressional mandate expressed in the Federal Declaratory Judgments Act (28 U.S.C. §2201) is to be frustrated, and federal courts are to be relegated to a secondary and less than equal position as protectors of federal constitutional rights.

In *Zwicker v. Koota*, 389 U.S. 241 (1967) this Court laid down these guidelines: federal courts were to treat the demands for declaratory judgment and injunctive relief separately; a court could grant declaratory relief even though injunctive relief was not justified, and the fact that a prayer for declaratory relief was coupled with a prayer for injunctive relief did not alter the rule. Abstention was not proper when a state statute regulating expression was justifiably attacked as constitutionally overbroad; in that case, the lower court should grant

declaratory relief even if injunctive relief was not merited. 389 U.S. 241, 254 .

Circuit Judge Thornberry read *Zwickler* accurately when he held, in a case in which the request for declaratory judgment was made during the pendency of a state court prosecution:

"The Court [in *Zwickler*] emphasized the special duty of federal courts to vindicate federal rights, especially when the challenge is that a statute on its face is repugnant to the First Amendment. *Id.*, 88 S. Ct. at 395. The court squarely held that the abstention doctrine is inappropriate for cases in which the statute is justifiably attacked on its face for an 'overbreadth' that abridges free expression. *Id.*, 88 S. Ct. at 396, 399."

Davis v. Francois, 395 F. 2d
730, 732 (5th Cir., 1968)

The Declaratory Judgments Act provides that a federal court, after granting a declaratory judgment, may give "further necessary or proper relief" to the litigant who prevails. The court below did this by ordering a return of the materials seized and ordering their suppression as evidence in any prosecutions of the news dealers. This order complementing the declaratory judgment was reasonable and necessary to effectuate the judgment that the arrest and seizures were illegal. The court did not tell the defendants below that they could not proceed with their prosecution, and in fact specifically declined to do so, but the court asserted its prerogative as a court designed to protect federal constitutional rights by determining what was to happen to the magazines. The news store owners, two of whom were not be-

ing prosecuted in state court, properly asked that the federal court order the return of their illegally seized magazines, and the court below properly ordered their return.

B. The Civil Rights Act is One of the Exceptions Mentioned in the Federal Anti-Injunction Statute, Since the Civil Rights Act Authorizes An Injunction And Such Is "Expressly Authorized By Act of Congress."

It is submitted that it is not necessary to reach the applicability of the Anti-Injunction Statute (28 U.S.C. 2283) to the Civil Rights Act (42 U.S.C. 1983) in this case, since the state proceedings were not enjoined. However, should this Court decide that the relief in paragraphs 1 and 2 of the judgment below constitute "an injunction to stay proceedings" in the State court, then it is further submitted that the action below was proper because the Civil Rights Act is an Act of Congress expressly authorizing such an injunction.

In *Amalgamated Clothing v. Richman Brothers*, 348 U.S. 511 (1955), this Court held that a statute could "expressly" authorize an exception to the Anti-Injunction Act even though the statute did not by its terms refer to the act. 348 U.S. at 516. The Civil Rights Act (42 U.S.C. §1983) provides for a "suit in equity," and, after all, what is a suit in equity but a request for an injunction? See also: *Dilworth v. Riner*, 343 F. 2d 226 (5th Cir., 1965); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220.

An examination of the purpose sought to be achieved by the enactment of §1983 leads to the conclusion that it must be read as an exception to §2283. 42 U.S.C.

§1983 is derived almost intact from §1 of the 1871 "Act to Enforce the Fourteenth Amendment." The Reconstruction Congresses were concerned not only with protecting the civil rights of the newly enfranchised citizenry but also with insuring that the Federal Government be given the principal responsibility for this protection. The Congresses had also passed the Thirteenth, Forteenth, and Fifteenth Amendments, which the Court said in *Strauder v. West Virginia*, 100 U.S. 303, 306-307, had a common purpose, namely to secure rights to the recently emancipated slaves. See *Ex Parte Virginia*, 100 U.S. 339.

The legislative history of §1983 indicates that it was enacted to protect the rights of those newly freed and to grant them access to federal courts for the protection of those rights. See Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 Rutgers L. Rev. 92, 109-113; *Monroe v. Pape*, 365 U.S. 167, 180; *Landry v. Daley*, 288 F. Supp. 200, (N.D. Ill. 1968). If 42 U.S.C. §1983 is not regarded as an exception to §2283, the statutory scheme for the protection of constitutional rights would be rendered nugatory whenever state action falling within the ban of §1983 took the form of a legal proceeding. A claimant alleging applicability of "the Dombrowski Doctrine", *Dombrowski v. Pfister*, 380 U.S. 479, usually will not be able to present a "case or controversy" unless prosecution is threatened, and in the great bulk of the cases the threat of prosecution will not manifest itself until charges have been filed. Thus as a practical matter the Dombrowski doctrine is essentially valueless unless it may be applied to pending prosecutions in state courts. It is submitted that Judge Wisdom of the 5th Circuit was correct when he found in his concurring opinion in *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967) that §1983 was an express ex-

ception to the Anti-Injunction Act because §1983 represented federal interposition under the Supremacy Clause to protect individuals from state denial of their constitutionally protected rights. 266 F. Supp. at 570.

Undersigned counsel had the pleasure of representing several successful appellants in the Fifth Circuit in a case where the petitioners in their removal petition had alleged, *inter alia* that the state statute under which they were being prosecuted was unconstitutionally vague on its face. However, when that case reached this Court the Fifth Circuit's grant of the removal petition was reversed, *City of Greenwood v. Peacock*, 384 U.S. 808, this Court holding at page 829:

"But there are many other remedies available in the Federal Courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the Federal Court. See *Dombrowski v. Pfister*, 380 U.S. 479."

This Court thus recognized that in the circumstances of that case (where removal was obviously sought after the state prosecutions had commenced), a federal injunction would be a remedy available to petitioner. The four dissenting justices explicitly recognized that a federal court could enjoin pending state prosecutions:

"Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights.

We said in *N.A.A.C.P. v. Button*, 371 U. S. 415, 433, respecting some of these federal rights, that '[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' In a First Amendment context we said: 'By permitting determination of the invalidity of these statutes without regard to the impermissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.' *Dombrowski v. Pfister*, 380 U.S. 479, 487. The latter case was a suit to enjoin a state prosecution. The present cases are close kin. For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right." 384 U.S. at 845-846.

IV.

THE THREE-JUDGE COURT BELOW PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE RELIEF IN PARAGRAPH 4 OF THE JUDGMENT OF AUGUST 14, 1969, DECLARING THE ST. BERNARD PARISH OBSCENITY ORDINANCE TO BE UNCONSTITUTIONAL.

Appellees argument favoring the decision by the court below to declare the St. Bernard Ordinance unconstitutional is substantially the same as appears in the immediately preceding argument regarding the declaration of unconstitutionality of the state obscenity statute.

However, with regard to this question, which was

specially posed for the parties by the Court, Appellants point out in their brief that prior to the hearing below a *nolle prosequi* had been entered in the charges against Appellee Ledesma relative to the Parish ordinance, terminating the prosecution thereunder. (Appellants' brief, p. 26). Therefore, Appellants contend, at the time of trial there was no "controversy of sufficient immediacy and reality to warrant a declaratory judgment." (Brief, p. 26). This argument demonstrates clearly how the Appellants would remove federal courts from protecting federal rights. If no charge is pending in state court against a defendant, there is simply no case or controversy to warrant his obtaining a declaratory judgment. On the other hand, if a case is pending against him, the federal court should abstain and let the matter proceed in state court. It is submitted that federal courts do have a role in protecting rights guaranteed by the Federal Constitution, and the court below recognized that fact.

CONCLUSION

It is submitted that Appellants' actions in arresting Appellee Ledesma and seizing dozens of magazines owned by Appellees, without having first obtained a search warrant or arrest warrant, and without there having first been held a prior adversary judicial hearing on the question of the obscenity of the publications, constituted clear violations of Appellees' rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution. The court below was correct and exercised proper discretion in declaring the State statute and St. Bernard Parish ordinance to be unconstitutional, and was further correct and used proper discretion in declaring the procedures used by Appellants to be unconstitutional.

and in rendering necessary orders to effectuate its judgment. The magazines possessed and sold by Ledesma were not obscene as a matter of law, and Ledesma was protected in the manner of usage and dissemination of his publications by the First and Fourteenth Amendments to the United States Constitution. For the foregoing reasons the judgment below should be affirmed or modified in such manner as to grant Appellees injunctive relief from those acts declared by the court below to be unconstitutional.

Respectfully submitted,

JACK PEEBLES
323 West William David Parkway
Metairie, Louisiana 70005
Attorney for Appellees

Of counsel:

Stanley Fleishman
Suite 718 Max Factor Bldg.
6922 Hollywood Blvd.
Hollywood, Calif. 90028

Robert Eugene Smith
Suite 507
The Alex. Brown & Sons Bldg.
102 W. Pennsylvania Ave.
Towson, Md. 21204

PROOF OF SERVICE

I, Jack Peebles, attorney for Appellees herein, hereby certify that I have served three copies of the foregoing original brief on behalf of Appellees upon Appellants herein, by mailing same, postage prepaid, to their counsel of record, Charles H. Livaudais, 2006 Pakenham Drive, Chalmette, Louisiana 70043, prior to the filing thereof in the United States Supreme Court.

JACK PEEBLES

Attorney for Appellees

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1970

Leander H. Perez, Jr., et al., Appellants, v. August M. Ledesma, Jr., et al.	}	On Appeal from the United States District Court for the Eastern District of Louisiana.
--	---	---

[February 23, 1971]

MR. JUSTICE BLACK delivered the opinion of the Court.

Given our decisions today in No. 2, *Younger v. Harris*, ante; No. 7, *Samuels v. Mackell*, ante; No. 9, *Fernandez v. Mackell*, ante; No. 4, *Boyle v. Landry*, ante; No. 83, *Byrne v. Karalexis*, ante; and No. 41, *Dyson v. Stein*, ante, in which we have determined when it is appropriate for a federal court to intervene in the administration of a state's criminal laws, the disposition of this case should not be difficult.

I

Ledesma and the other appellees operated a newsstand in the Parish of St. Bernard, Louisiana, where they displayed for sale allegedly obscene magazines, books, and playing cards. As a result of this activity, appellees were charged in four informations filed in state court with violations of Louisiana statute, LSA-RS 14-106, and St. Bernard Parish Ordinance 21-60. After the state court proceedings had commenced by the filing of the informations, appellees instituted the instant suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Since the appellees sought a judgment declaring a state statute of

statewide application unconstitutional, together with an injunction against pending or future prosecutions under the statute, a three-judge court was convened. That court held the Louisiana statute constitutional on its face, but ruled that the arrests of appellees and the seizure of the allegedly obscene materials were invalid for lack of a prior adversary hearing on the character of the seized materials. Although the three-judge court declined to issue an injunction against the pending or any future prosecutions, it did enter a suppression order and require the return of all the seized material to the appellees. 304 F. Supp. 662, 667-670 (1969). The local district attorney and other law enforcement officers appealed and we set the case for argument but postponed the question of jurisdiction to the hearing on the merits. 399 U. S. 924 (1970).¹

It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings. Even the three-judge court recognized that its judgment would effectively stifle the then pending state criminal prosecution.

"In view of our holding that the arrests and seizures in these cases are invalid for want of a prior adversary judicial determination of obscenity, which holding requires suppression and return of the seized materials, *the prosecutions should be effectively terminated.*" 304 F. Supp., at 670. (Emphasis added.)

¹ Under 28 U. S. C. § 1253 an aggrieved party in any civil action required to be heard and determined by a district court of three judges "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." The orders directing the suppression of evidence and the return of the seized material were injunctive orders against the appellants. Thus, we have jurisdiction to review those orders.

Moreover, the District Court retained jurisdiction "for the purpose of hereafter entering any orders necessary to enforce" its view of the proper procedures in the then pending state obscenity prosecution. According to our holding in *Younger v. Harris*, *ante*, such federal interference with a state prosecution is improper. The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, see *Stefanelli v. Minard*, 342 U. S. 117 (1951), subject, of course, to review by certiorari or appeal in this Court or, in a proper case, on federal habeas corpus. Here Ledesma was free to present his federal constitutional claims concerning arrest and seizure of materials or other matters to the Louisiana courts in the manner permitted in that State. Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate. See *Younger v. Harris*, *ante*; *Ex parte Young*, 209 U. S. 123 (1908). There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the State's criminal laws. We therefore hold that the three-judge court improperly intruded into the State's own criminal process and reverse its orders suppressing evidence in the pending state prosecution and directing the return of all seized materials.

II

After crippling Louisiana's ability to enforce its criminal statute against Ledesma, the three-judge court expressed the view that the Parish of St. Bernard Ordinance 21-60 was invalid. Although the court below recognized that "it is not the function of a three-judge federal dis-

trict court to determine the constitutionality or enjoin the enforcement of a local ordinance," the court nevertheless seized the "opportunity to express its views of the constitutionality of the ordinance." 304 F. Supp. 662, 670 n. 31 (1969). Judge Boyle, the district judge who initially referred the action to the three-judge court, adopted that court's view and declared the parish ordinance invalid. There is considerable question concerning the propriety of issuing a declaratory judgment against a criminal law in the circumstances of this case.²

III

We are, however, unable to review the decision concerning the local ordinance because this Court has no jurisdiction to review on direct appeal the validity of a declaratory judgment against a local ordinance, such as St. Bernard Parish Ordinance 21-60. Even if an order granting a declaratory judgment against the ordinance had been entered by the three-judge court below (which it was not), that court would have been acting in the capacity of a single-judge court. We held in *Moody v. Flowers*, 387 U. S. 97 (1967), that a three-judge court was not properly convened to consider the constitutionality of a statute of only local application, similar to a local ordinance. Under 28 U. S. C. § 1253 we have jurisdiction to consider on direct appeal only those civil actions "required to be heard and determined" by a three-judge court. Since the constitutionality of this parish ordi-

² At the time the instant federal court suit was filed, there was pending in Louisiana state court a criminal prosecution under the parish ordinance. In *Samuels v. Mackell*, *ante*, we held that interference with pending state criminal prosecutions by declaratory judgments is subject to the same restrictions curbing federal interference by injunction. *Ante*, at —. As indicated above, there are no facts present in this record to show that appellees would suffer irreparable injury of the kind necessary to justify federal injunctive interference with the state criminal processes.

nance was not "required to be heard and determined" by a three-judge panel, there is no jurisdiction in this Court to review that question.

The fact that a three-judge court was properly convened in this case to consider the injunctive relief requested against the enforcement of the state statute, does not give this Court jurisdiction on direct appeal over other controversies where there is no independent jurisdictional base. Even where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them.³ See *Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U. S. 204 (1939).

In this case, the order granting the declaratory judgment was not issued by a three-judge court, but rather by Judge Boyle, acting as a single district judge. The three-judge court stated:

"The view expressed by this court on the constitutionality of the ordinance is shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith."

304 F. Supp., at 670, n. 31. (Emphasis added.)

The last clause of the quoted sentence indicates what, under *Moody v. Flowers*, must be the case: The decision granting declaratory relief against the Parish of St. Ber-

³ Aside from the limited local application of the ordinance, which bars a direct appeal under *Moody v. Flowers*, 387 U. S. 97 (1967), there is a question whether a successful party can properly maintain an appeal. The statute, 28 U. S. C. § 1253, permits a direct appeal only from an order granting or denying an injunction. The State successfully opposed an injunction against the enforcement of the parish ordinance in the court below and now cannot appeal from its victory. See *Gunn v. University Committee To End the War in Viet Nam*, 399 U. S. 383, 391 (1970) (WHITE, J., concurring).

nard Ordinance 21-60 was the decision of a single federal judge. This fact is confirmed by the orders entered by the two courts. The three-judge court entered the following order at the end of its opinion.

"Accordingly, for the reasons assigned, it is ordered that judgment in both cases be entered decreeing:

"1. That all seized materials be returned, *instante*, to those from whom they were seized,

"2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,

"3. That the preliminary and permanent injunctions prayed for be denied, and

"4. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper."

The order of the single-judge District Court is as follows:

"For the reasons assigned in the foregoing 3-judge court opinion, it is ordered that judgment be entered herein decreeing:

"1. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional.

"2. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper." 304 F. Supp., at 670-671.

The fact that the clerk of the District Court merged these orders into one judgment does not confer jurisdiction upon this Court. In the first place, our jurisdiction cannot be made to turn on an inadvertent error of a court clerk. Second, the jurisdictional statute by its own terms grants a direct appeal from "an *order* granting or denying" an injunction. 28 U. S. C. § 1253. (Emphasis added.) Since the order entered by the three-judge

court omits any reference to declaratory relief, the discussion of such relief in the court's opinion is dictum.

The judgment of the court below is reversed insofar as it grants injunctive relief. In all other respects the judgment is vacated and the case remanded to the United States District Court with instructions to enter a fresh decree from which the parties may take an appeal to the Court of Appeals for the Fifth Circuit if they so desire.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1970

Leander H. Perez, Jr., et al., Appellants, v. August M. Ledesma, Jr., et al.	}	On Appeal from the United States District Court for the Eastern District of Louisiana.
--	---	---

[February 23, 1971]

MR. JUSTICE DOUGLAS.

I

The three-judge panel was properly convened under § 2281 to consider the validity of a Louisiana statute of general application. That court was also asked, however, to pass on an ordinance of St. Bernard Parish. But I agree with part III of the opinion of the Court written by MR. JUSTICE BLACK that we have no jurisdiction over that phase of the litigation.

It is by now elementary that a three-judge court may not be convened to consider the validity of a local ordinance or a statute of local application. *Moody v. Flowers*, 387 U. S. 97, 101. The three-judge court recognized that it had no jurisdiction to pass upon the constitutionality of the ordinance; but it expressed "its views . . . in the interest of judicial economy [since it was] shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith." 304 F. Supp. 662, 670, n. 31. It then stated that "We have examined the ordinance and find it to be unconstitutional and unenforceable." *Ibid.*

The single District Judge then ordered that a judgment be entered, holding that the ordinance was unconstitutional. 304 F. Supp., at 671. That order is obviously the judgment which is the basis of an appeal.

Later on, the clerk also entered a judgment to that effect for the three-judge court.

The judgment entered pursuant to the order of the single District Judge should go to the Court of Appeals for review, not to this Court. Moreover, even if the judgment entered by the clerk was authorized by the three-judge court, it is not properly here. For the order or judgment concerning the ordinance would be here only if the three-judge court had pendent jurisdiction over the claim.

Pendent jurisdiction does extend to nonconstitutional grounds for challenging a statute when a constitutional challenge is also raised. *Siler v. Louisville & N. R. R.*, 213 U. S. 175; *Davis v. Wallace*, 257 U. S. 478; *Sterling v. Constantin*, 287 U. S. 378, 393; *United States v. Georgia Pub. Serv.*, 371 U. S. 285; *Florida Lime Growers v. Jacobson*, 362 U. S. 73, 75-85; and *Flast v. Cohen*, 392 U. S. 83, 88-91. State causes of action have been appended to federal causes of action in a one-judge court where all causes of action arose out of the same set of facts. *United Mine Workers v. Gibbs*, 383 U. S. 715. This case, however, does not involve a challenge to one statute or a request for one award of relief on different grounds, but a challenge to two different laws on the same grounds. The only argument for considering both these laws together is that Ledesma was charged under both. This is not sufficient, under any ruling of this Court, to give jurisdiction, on direct appeal, over the ruling. The appellants did not challenge the jurisdiction of the three-judge court or the appellate jurisdiction of this Court over this claim. But subject matter jurisdiction of the federal courts may not be bestowed by the parties. *United States v. Griffin*, 303 U. S. 226, 229. The cases cited by appellants do not support jurisdiction over this claim. *Zemel v. Rusk*, 381 U. S. 1, allowed a challenge to an administrative action, as not authorized by statute,

to be joined with a constitutional attack on the statutes which purportedly authorized the action. *Milky Way Productions v. Leary*, 305 Supp. 288, was a *per curiam* affirmance, without opinion. 397 U. S. 98. The issues presented to this Court were conceded by all parties to be constitutional attacks on the obscenity statutes and the arrest warrant statutes of New York. Because the three-judge court had jurisdiction over the attack on the arrest warrant statutes, independent of any other claim, the issue of pendent jurisdiction was not involved and was not raised.* Therefore, that problem was not considered in our *per curiam*, and our affirmance was not a holding on pendent jurisdiction. We cannot decide *Perez* on the basis of *Milky Way*, but only on the basis of applicable precedent and reason. And no precedent or reason is advanced for any enlargement of pendent jurisdiction.

If a rewriting of the law on pendent jurisdiction is to be done, the Congress should do it.

*None of the parties raised any question concerning pendent jurisdiction in this Court.

New York Feed complained that the arrest, without prior adversary hearing was unconstitutional.

Milky Way attacked the arrest warrant statutes as unconstitutional "as applied in law," alleging they were overbroad, an illegal prior restraint, and vague.

The Attorney General of New York, in both cases, treated the claim as an attack on the constitutionality of the arrest warrant statutes and argued that they were constitutional.

The District Attorney argued that petitioners' attack on the arrest warrant statutes was improper because they did not preclude the adversary hearing. He did not, however, raise any jurisdictional questions as to the power to the three-judge court to pass on the legality of the arrests.

The City of New York raised no jurisdictional challenge.

In reply, both petitioners argued that the arrest warrant statutes were "unconstitutional as applied in law."

The present judgment should be reviewed in the Court of Appeals, not here. *Rorick v. Comm'rs*, 307 U. S. 208.

II

As to the orders of the three-judge court suppressing evidence in the prosecution under the Louisiana statute, which the Court sets aside, I dissent. My views, which are not congenial to the majority, are set forth at some length in *Younger v. Harris* and *Dyson v. Stein* decided this day.

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1970

Leander H. Perez, Jr., et al., Appellants, v. August M. Ledesma, Jr., et al.	}	On Appeal from the United States District Court for the Eastern District of Louisiana.
--	---	---

[February 23, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring.

In joining the opinion and judgment of the Court, I add these few concurring words.

The three-judge District Court's decree suppressing the use of the seized material as evidence and ordering its return to the appellees was an injunctive order, from which an appeal was properly taken directly to this Court. 28 U. S. C. § 1253. The decree was plainly wrong under *Stefanelli v. Minard*, 342 U. S. 117, and I agree that it must be reversed. In *Stefanelli* we affirmed the refusal of a federal district court to suppress the use in a pending state prosecution of evidence which the petitioners alleged had been obtained in an unlawful search. Our ruling there is clearly applicable to the facts before us:

“We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure.” 342 U. S., at 120.

See also *Cleary v. Bolger*, 371 U. S. 392, 400.

I also agree that the appeal from the declaratory judgment holding the parish ordinance unconstitutional is not properly before us. This Court has no power to

consider the merits of that appeal for two quite distinct reasons, each sufficient to defeat our jurisdiction. First, the ordinance is neither a state statute nor of statewide application. The case thus presents *a fortiori* the situation in which the Court found no jurisdiction in *Moody v. Flowers*, 387 U. S. 97, 101. Second, the appeal is from the grant of declaratory relief, not from the grant or denial of an injunction, and jurisdiction under 28 U. S. C. § 1253 is therefore lacking. *Gunn v. University Committee To End the War in Viet Nam*, 399 U. S. 383; *id.*, at 291 (WHITE, J., concurring).

This is not a case in which the District Court's action on the prayer for declaratory relief was so bound up with its action on the request for an injunction that this Court might, on direct appeal, consider the propriety of declaratory relief on pendency grounds. Cf. *Zwickler v. Koota*, 389 U. S. 241; *Samuels v. Mackell*, *ante*. Indeed, the District Court itself recognized that the request for a declaratory judgment regarding the local ordinance was so unrelated to the prayer for injunctive relief against the state statute that the single District Judge entered a separate order declaring the ordinance unconstitutional.

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1970

Leander H. Perez, Jr., et al., Appellants, v. August M. Ledesma, Jr., et al.	}	On Appeal from the United States District Court for the Eastern District of Louisiana.
--	---	---

[February 23, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger v. Harris*, ante; No. 7, *Samuels v. Mackell*, ante; No. 9, *Fernandez v. Mackell*, ante; No. 4, *Boyle v. Landry*, ante; No. 83, *Byrne v. Karalexis*, ante; and No. 41, *Dyson v. Stein*, ante, all decided today.

Appellees operate a newsstand in the Parish of St. Bernard, Louisiana. On January 27, 1969, sheriff's officers of the parish, without warrants, raided the newsstand, seized allegedly obscene magazines, books, and playing cards from the shelves, and arrested appellee August M. Ledesma, Jr., an owner, for displaying obscene materials for sale. On February 10, 1969, four informations were filed in the state district court, two charging Ledesma with the crime of obscenity in violation of a Louisiana statute, LSA-RS 14-106, and two charging him with obscenity in violation of St. Bernard Parish Ordinance 21-60. The statute and ordinance appear as Appendix A. On February 17, 1969, appellees filed the instant action in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Their complaint sought a judgment under the Federal Declaratory

Judgment Act, 28 U. S. C. § 2201, declaring the state statute and parish ordinance unconstitutional; an injunction against pending and future prosecutions under either enactment; and an injunction directing the return of the seized magazines, books, and playing cards and suppressing their use as evidence in any pending or future criminal prosecution against the appellees. A three-judge court was convened. Prior to the federal court hearing, the appellant entered a *nolle prosequi* in the state court on the two informations charging violation of the parish ordinance.

The three-judge court filed an opinion holding (a) that the Louisiana statute was constitutional on its face; (b) that the parish ordinance was unconstitutional on its face; and (c) that the arrest of appellee Ledesma and the seizure of the magazines, books, and playing cards were unconstitutional in the absence of a prior judicial adversary hearing determining that the seized materials were obscene. 304 F. Supp. 662 (1969). The court stated that because it was confident the appellants would comply with the court's views it was "unnecessary to issue any injunctions" against "pending or future prosecutions or future arrests and seizures." 304 F. Supp., at 670. In pertinent part the judgment entered on August 14, 1969, therefore decreed:

"1. That all seized materials be returned, instant, by the [appellants] to those [appellees] from whom they were seized,

"2. That said materials be suppressed as evidence in any pending or future prosecutions of the [appellees],

"3. That the preliminary and permanent injunctions prayed for be denied,

"4. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional." Joint App. 106-107.

We postponed consideration of a question of jurisdiction to the hearing on the merits. 399 U. S. 924 (1970). In addition to the questions presented in the jurisdictional statement, our order requested the parties to brief and argue the following questions:

"1. Was it an appropriate exercise of discretion for the three-judge court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969, in view of the pendency of the state prosecution charging violation of Louisiana Revised Statute 14:106?

"2. Was it an appropriate exercise of discretion for the three-judge court in paragraph 4 of said judgment to declare the St. Bernard Parish Ordinance No. 21-60 unconstitutional?"

I agree with the Court (1) that this is a proper appeal to this Court, and (2) that it was not an appropriate exercise of discretion for the three-judge court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969. I dissent, however, from the holding of the Court that the declaratory judgment which is paragraph 4 of the judgment of the three-judge court is not properly before us for review. I think that it is and, on the merits, would hold that it was an appropriate exercise of discretion for the court in paragraph 4 to declare St. Bernard Parish Ordinance No. 21-60 unconstitutional. I would, therefore, reverse and set aside paragraphs 1 and 2 of the judgment of August 14, 1969, but in all other respects would affirm that judgment.

I

Jurisdiction

Appellants' assertion of a right of direct appeal to this Court relies upon 28 U. S. C. § 1253. That section per-

mits an appeal in any civil action required to be heard and determined by a district court of three judges "from an order granting or denying . . . an interlocutory or permanent injunction."¹ Paragraph 3 of the order of August 14, 1969, decrees "That the preliminary and permanent injunctions [against pending and future prosecutions] prayed for be denied." But § 1253 does not permit these appellants to appeal this portion of the judgment, since they prevailed to the extent of this denial of appellees' prayers for injunctive relief. *Gunn v. University Committee To End The War In Viet Nam*, 399 U. S. 383, 391 (1970) (WHITE, J., concurring). However, paragraphs 1 and 2 of the judgment are injunctive orders against appellants directing them not to use the seized materials as evidence against appellees in any pending or future prosecutions and directing the return of those materials. These provisions clearly qualified the judgment as an order "granting . . . an . . . injunction," from which appellants could appeal directly to this Court.

II

The Injunctions

The companion cases decided today hold that a federal court should not interfere by injunction with an existing state criminal prosecution pending against the federal court plaintiff at the time the federal action is brought, except upon a showing that great, immediate, and irreparable injury is threatened. Such a showing may be, for example, in the form of bad-faith harassment of the federal court plaintiff by state law enforcement of-

¹ The full text of 28 U. S. C. § 1253 is as follows:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

ficials. These decisions adhere to the policy established by this Court that, in the absence of such showing, "[i]t is generally to be assumed that state courts and prosecutors will observe [in the pending prosecution] constitutional limitations as expounded by this Court." *Dombrowski v. Pfister*, 380 U. S. 479, 484 (1965). While the three-judge court sustained the constitutionality of the state statute on its face (a holding not before us on this appeal), the court interfered with the pending state prosecution under the statute to the extent of ordering the return of the seized materials and suppressing their use as evidence in the prosecution, thus leaving the State free to proceed with the prosecution on the basis of other evidence. This interference was improper on this record. There is an utter absence of any evidence that the seizures and the arrest of appellee Ledesma, and the filing of the informations accusing Ledesma of violation of the state statute, were undertaken in bad faith to harass appellees, or for any purpose except the good faith enforcement of the State's criminal laws. I have no occasion to consider, and intimate no view upon the holding of the Federal District Court that, as to the seizures and the arrest of appellee Ledesma, "the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity." 304 F. Supp., at 667.² That appeal to federal constitutional protections was open to appellee Ledesma in the state prosecution by way of challenge, in any manner permitted by Louisiana criminal procedure, to the validity of the arrest, and objections to admission into evidence of, or motions to suppress use of, the materials. In *Dombrow-*

² For a contrary view to that of this three-judge court as to the necessity of a hearing prior to an arrest for obscenity, see *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288, 295-297 (SDNY 1969), *aff'd sub nom., New York Feed Co. v. Leary*, 397 U. S. 98 (1970).

ski, the Court expressly included controversies over the admissibility of evidence as controversies which, without more, involved "no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a [state] criminal prosecution." 380 U. S., at 485. The Court said: "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment." *Id.*, at 485 n. 3. While there may be circumstances in which a federal court could properly adjudicate such a claim, this record discloses none which justified this three-judge court in doing so. I therefore join the Court in concluding that paragraphs 1 and 2 of the judgment should be reversed and set aside.

III

The Declaratory Judgment as to the Parish Ordinance

Threshold questions must be answered before the merits of the declaratory judgment which is paragraph 4 of the judgment of the three-judge court are reached.

The first threshold question is whether the declaratory judgment is properly before us for review. Two opinions, both authored by Judge Boyle who initiated the three-judge panel, were filed on July 14, 1969, one for the three-judge court and the other a separate opinion of Judge Boyle. Judge Boyle's opinion for the three judges explained: "Although it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance, as distinguished from statutes of statewide application, *Moody v. Flowers*, 387 U. S. 97 (1967), the court takes this opportunity to express its views on the constitutionality of the ordinance in the interest of judicial economy. The view expressed by this court concerning the

constitutionality of the ordinance is shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith." 304 F. Supp., at 670 n. 31 (emphasis added). Judge Boyle's separate opinion was a brief statement: "For the reasons assigned in the foregoing 3-Judge Court opinion, it is ordered that judgment be entered herein decreeing: (1) That St. Bernard Parish Ordinance No. 21-60 is unconstitutional. (2) That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper." 304 F. Supp., at 671.

The Court holds that this Court has no jurisdiction to review the declaratory judgment on the premise that the declaratory judgment against the local ordinance was not issued by the three-judge court but rather by Judge Boyle acting as a single judge. With all respect this is not the case. Both the Court and my Brothers DOUGLAS and STEWART insist that Judge Boyle's separate statement was in fact a judgment. I would suppose Judge Boyle himself is the best authority as to that and he expressly referred to the statement as "his opinion." Appeals are, of course, taken from judgments and not from opinions. No judgment was entered by Judge Boyle pursuant to his separate opinion and therefore there existed no judgment pursuant to the order of the single judge to go to the Court of Appeals for review. The only judgment entered in the case was that entered by the three-judge court on August 13, 1969. Since the injunctions in paragraphs 1 and 2 rendered that judgment appealable directly to this Court, paragraph 4 of that judgment, the declaratory judgment, is necessarily before us.

However, other considerations require that we decide whether the three-judge court properly rendered the declaratory judgment. Our Per Curiam affirmance in *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288 (SDNY 1969), aff'd *sub nom. New York Feed Co. v.*

Leary, 397 U. S. 98 (1970), fully supports the action of the three-judge court in doing so. That case did not present attacks on a statute and ordinance but rather attacks on two different New York statutes. The first attack was on N. Y. Penal Law § 235 (1965), New York's general obscenity statute. The second attack was on N. Y. Code Crim. Proc. §§ 148-150 (19—). The District Court held that a three-judge court was required to deal with the attack on § 235, since the claim was that that section was facially unconstitutional. However, the attack on §§ 148-150 of the Code of Criminal Procedure was not that those sections were facially unconstitutional but only that those sections were unconstitutionally invoked before there had been an adversary judicial determination on the obscenity of the publications in question (*i. e.*, as applied). The District Court acknowledged that the attack on the Code provisions was thus probably not for determination by three judges, but "as a simple claim of official lawlessness, cognizable by one judge." 305 F. Supp., at 295. Nevertheless, the District Court, invoking the principle that once three-judge court jurisdiction is established on one claim, the court may consider other issues that alone would not have called for three judges, held that, since there was three-judge jurisdiction of the claim of the facial unconstitutionality of § 235, jurisdiction existed also to determine the merits of the claim that the criminal procedure provisions were unconstitutionally applied. 305 F. Supp., at 295-296. Our affirmance sustained this holding. Plainly that affirmance governs this case and sustains the propriety of the action of the three-judge court in passing on the constitutionality of the ordinance. Appellants concede that *Milky Way* forecloses any challenge on their part to the action of the three-judge court. Indeed, they regard the action of the three-judge court

as supported by the cases in this Court authorizing three-judge courts to consider attacks on statutes on nonconstitutional grounds when those courts are properly convened to hear constitutional challenges to the statutes.³

The appellants argue, however, that no controversy requisite to relief under the Federal Declaratory Judgment Act existed after the *nolle prosequi* was entered. This argument presents the second threshold question.

Appellants rely upon *Golden v. Zwickler*, 394 U. S. 103 (1969). In that case a New York criminal statute prohibited the distribution of anonymous handbills in election campaigns. A distributor of anonymous handbills opposing the reelection of a Congressman sought in federal court a judgment declaring the statute unconstitutional. The federal action was brought after reversal by the New York courts of the appellee's conviction for distributing handbills during an earlier campaign of the Congressman. See *Zwickler v. Koota*, 389 U. S. 241 (1967). Appellee desired to distribute handbills during a forthcoming campaign of that Congressman, but the Congressman had retired from Congress to become a justice of the New York Supreme Court. In those circumstances the Court held that no "controversy" requisite to declaratory relief existed, since Zwickler's only target was a particular Congressman and "the prospect was neither real nor immediate of a campaign involving the Congressman." 394 U. S., at 109.

³ *Flast v. Cohen*, 392 U. S. 83, 88-91 (1968); *Zemel v. Rusk*, 381 U. S. 1, 5-7 (1965); *United States v. Georgia Public Service Commission*, 371 U. S. 285, 287-288 (1963); *Florida Lime Growers v. Jacobson*, 362 U. S. 73, 75-85 (1960); *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288, 295 (SDNY 1969), *aff'd sub nom. New York Feed Co. v. Leary*, 397 U. S. 98 (1970).

The situation here is quite different, however. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). Appellees' complaint expressly alleges, and there was no evidence or finding to the contrary, that appellees "desire to continue to keep for sale and to sell" the publications and playing cards in question. Thus, unlike the situation in *Golden*, the question of the constitutionality of the ordinance is "presented in the context of a specific live grievance." 394 U. S., at 110. This conclusion is buttressed by the finding of the three-judge court that "[appellees] fear prosecution [under the ordinance] at some future date." 304 F. Supp., at 670. Indeed, in light of the appellants' aggressive prosecution of appellees, the inference is permissible that any attempts by appellees to continue to display the questioned publications for sale might well again be met with prosecutions under both the statute and ordinance. There is no question that there is a continuing controversy between the appellants and the State involving the sale of allegedly obscene publications. Appellants did not assert the contrary before the District Court, nor do they assert the contrary here.⁴ I conclude that

⁴ Despite the order to return the seized materials, appellants were not without evidence on which to prosecute appellee Ledesma. The evidence obtained on the night of January 27, 1969, was not just the seized materials. The parties stipulated at the hearing before the three-judge court that immediately before a sheriff's officer arrested Ledesma, the officer purchased two allegedly obscene magazines from Ledesma, and that another officer purchased two other and different publications from him. The District Court expressly accepted these purchased publications from those ordered returned.

it cannot be said that the three-judge court erred in finding that there existed the "controversy" requisite under the Federal Declaratory Judgment Act.

The third threshold question is whether the state prosecution under the ordinance was "pending" so as to make federal intervention inappropriate. The fact is, as I have already noted, that informations against appellee Ledesma for violation of the ordinance were outstanding when this federal suit was filed. However, the *nolle prosequi* of those informations was entered before the three-judge court convened and heard the case. That court therefore treated the case as one in which no prosecution under the ordinance was pending. This was not error. The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the hearing and not upon the situation when the federal suit was initiated. See *Golden v. Zwickler*, 394 U. S., at 108. The principles of comity as they apply to federal court intervention, treated by the Court today in Nos. 2, 4, 7, 9, 41, and 83, see *supra*, at 1, present this issue. The key predicate to answering the question whether a federal court should stay its hand, is whether there is a pending state prosecution where the federal court plaintiff may have his constitutional defenses heard and determined. Ordinarily, that question may be answered merely by examining the dates upon which the federal and state actions were filed. If the state prosecution was first filed and if it provides an adequate forum for the adjudication of constitutional rights, the federal court should not ordinarily intervene. When, however, as here, at the time of the federal hearing there is no state prosecution to which the federal

saying, "Of course, [appellants] cannot be ordered to return the purchased materials, as in the instance of those seized, since the title thereto has passed." 304 F. Supp., at 667 n. 22.

court plaintiff may be relegated for the assertion of his constitutional defenses, the primary reason for refusing intervention is absent. Here, there was no other forum for the adjudication of appellees' constitutional objections to the ordinance.

There is, of course, some intrusion into a state administration of its criminal laws whenever a federal court renders a declaratory judgment upon the constitutionality of a state criminal enactment. The Court holds today in *Samuels v. Mackell*, *ante*, that considerations of federalism ordinarily make the intrusion impermissible if a state prosecution under that enactment is proceeding at the time the federal suit is filed. The Court says, "in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and . . . where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Samuels v. Mackell*, *ante*, at —. But considerations of federalism are not controlling when no state prosecution is pending and the only question is whether declaratory relief is appropriate. In such case, the congressional scheme which makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.

The controversy over the power of federal courts to declare state statutes unconstitutional and to enjoin their enforcement has roots that reach back at least to *Chisolm v. Georgia*, 2 Dall. 419 (1793), where in a contract action this Court held that a State could be sued by a citizen of another State. "That decision . . . created such a

shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States." *Hans v. Louisiana*, 134 U. S. 1, 11 (1890) (Bradley, J.). The Amendment was thought to have overruled *Chisolm*. Although the Amendment might have been construed to give a broad immunity from federal suits to States and state officials acting pursuant to state policy, that construction was rejected in *Osborn v. Bank of the United States*, 9 Wheat. 738, 847-858 (1824). *Osborn* involved a confiscatory state tax on a federal instrumentality. In sustaining a federal court injunction against the state tax, Chief Justice Marshall analyzed the controversy over federal judicial power as testing the viability of our federal system:

"The eleventh amendment . . . has exempted a State from the suits of citizens of other States . . . ; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands.

"Before we try this question by the constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States." 9 Wheat., at 847-848.

Though recognizing the sensitivity of granting injunctions in this context, the Court held that neither the Eleventh Amendment nor any principles of federalism prevented the lower federal courts from giving such relief where necessary to vindicate paramount federal law in a case where a State was not itself a party of record. The broad reach of the reasoning in *Osborn* has since been qualified, see generally L. Jaffe, *Judicial Control of Administrative Action* 213-222 (1965), but the basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect rights secured and activities authorized by paramount federal law remains firmly embedded in our jurisprudence. *Pennoyer v. McConaughy*, 140 U. S. 1, 9-18 (1891); *Ex parte Young*, 209 U. S. 123 (1908); *Truax v. Raich*, 239 U. S. 33, 37-38 (1915); *Terrace v. Thompson*, 263 U. S. 197, 214-215 (1923). See also *Leiter Minerals, Inc. v. United States*, 352 U. S. 220, 225-226 (1957) (Frankfurter, J.).

Ex parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. During the years between *Osborn* and *Young*, and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights. This history was reviewed in *Zwickler v. Koota*, 389 U. S., at 245-249. The principal foundations of the expanded federal jurisdiction in constitutional cases were the Civil Rights Act of 1871, 17 Stat. 13, which in § 1 empowered the federal courts to adjudicate the constitutionality of actions of any person taken under color of state statute, ordinance, regulation, custom, or usage, see 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3), and the Judiciary Act of 1875, 18 Stat. 470, which gave lower federal courts general federal question jurisdiction, see 28 U. S. C. § 1331. These two statutes,

together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court.

Ex parte Young involved a state regulatory statute with penal sanctions. At the suit of railroad stockholders, a federal circuit court temporarily enjoined the railroad from complying with the statute, and also temporarily enjoined Young, the state Attorney General, from instituting any proceedings to enforce the statute. Young nevertheless brought an enforcement proceeding in a state court, and was thereupon held in contempt by the circuit court. He brought habeas corpus in this Court, contending that the circuit court lacked jurisdiction to hold him in contempt. This Court held, first, that the original suit was properly within the general federal question jurisdiction of the circuit court; second, that "individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action," 209 U. S., at 155-156; and, third, that a federal court of equity has power in appropriate circumstances to enjoin a future state criminal prosecution: "When [the state] proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed." 209 U. S., at 161-162.

The decision in *Ex parte Young* provoked a reaction not unlike that which greeted *Chisolm v. Georgia*. Opposition focused principally on the power of lower federal courts, and of single judges of such courts, to issue preliminary injunctions, often *ex parte*, against the enforcement of state statutes, generally regulatory statutes carrying penalties. See generally *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 154 (1963); H. M. Hart & H. Wechsler, *The Federal Courts and the Federal System* 848-849 (1953); Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795, 803-810 (1934); Currie, *The Three Judge Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 5-7 (1964). The opinion in *Ex parte Young* anticipated the problem. The Court noted the objection "that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower federal courts a flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions." 209 U. S., at 166. The same year the case was decided Congress considered a measure to disable the lower federal courts from enjoining enforcement of state statutes, but the proposal failed to attract sufficient support for passage. See 42 Cong. Rec. 4848-4849 (1908). Two years later, a similar measure passed the House, see 46 Cong. Rec. 313, 316 (1910), but the Senate would not accept it. See F. Frankfurter and J. Landis, *The Business of the Supreme Court* 143 (1927). However, the same year, Congress did respond to *Ex parte Young*. It did not attempt to overrule the case by constitutional amendment or by statute; it did not seek to contain it by expanding the statutory bar against federal injunctions of state proceedings, 28 U. S. C. § 2283, beyond stays of suits already instituted; it did not follow the precedent of the Eleventh Amendment by excluding a

class of litigation from federal jurisdiction; nor did it anticipate the technique of the Norris-LaGuardia Act by forbidding the use of the injunction in a defined class of cases, see 47 Stat. 70, 29 U. S. C. §§ 101-115. Rather, Congress ratified the active role assigned to the federal courts by the post-Civil War legislation and accepted the basic holdings of *Ex parte Young*, but provided that a preliminary injunction against enforcement of a state statute could be issued only by a three-judge district court, see 36 Stat. 539, 557, now 28 U. S. C. § 2281,⁵ and that the decision of such a court granting or denying an injunction would be directly appealable to this Court. See 28 U. S. C. § 1253. Thus the Three-Judge Court Act confirmed Congress' acceptance of *Ex parte Young* and the course of federal adjudication of the constitutionality of state statutes which it represented,⁶ and Congress has never departed from that

⁵ The Three-Judge Court Act of 1910 originally applied only to interlocutory injunctions against enforcement of state statutes. See § 17, 36 Stat. 539, 557. A 1913 amendment extended the requirements to interlocutory injunctions against enforcement of state administrative orders. Act of March 4, 1913, c. 160, 37 Stat. 1013. The Judiciary Act of 1925 extended the three-judge requirement to permanent injunctions. 43 Stat. 936, 938. However, in *Smith v. Wilson*, 273 U. S. 388 (1927), it was held that the three-judge requirement applied only where the application for a permanent injunction was coupled with an application for an interlocutory injunction. The 1948 revision of the statute made the three-judge requirement applicable to requests for either interlocutory or permanent relief, whether or not the other form of relief was sought. Act of June 25, 1948, c. 646, 62 Stat. 869, 968.

⁶ In 1913 Congress dealt with another major defect in the federal injunction procedure. Injunction suits were commonly instituted in federal court shortly after the enactment of complex state regulatory measures and prior to their construction by the state courts. The result was that in one case a federal court gave an initial construction to the state statute and then, on the basis of that construction, adjudicated its constitutionality, thereby excluding the state courts altogether. See generally Lockwood, Maw, & Rosen-

acceptance on any of the several occasions when it has amended the Act. As Professor Wright has written, "[T]he doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law." C. Wright, *Handbook of the Law of Federal Courts* 186 (2d ed. 1970).⁷

berry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426, 428-429 (1930). The remedy provided by Congress, 37 Stat. 1013, is currently codified in 28 U. S. C. § 2284 (5), which provides in pertinent part:

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

The statute has proved largely ineffectual principally because of the stay requirement, which protects the constitutional interests of the federal court plaintiffs. See H. M. Hart & H. Wechsler, *supra*, at 854-855; Hutcheson, *supra*, at 822-823; Lockwood, Maw, & Rosenberry, *supra*, at 452-453. However, in cases where construction of complex state regulatory law is critical to a constitutional decision, the federal courts have developed on their own techniques for securing state court consideration of issues of state law. See, e. g., *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U. S. 496 (1941). The narrow scope of the doctrine of federal abstention was delineated in *Zwickler v. Koota*, 389 U. S. 241 (1967). See also American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1371, at pp. 282-298 (1969); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 Harv. L. Rev. 604 (1967).

⁷ The American Law Institute, in comments in connection with its proposed codification of the abstention doctrine, observes: "Suits in which it is claimed that state legislative or administrative action is invalid because contrary to controlling federal law present an especially appealing case for original federal jurisdiction. The

During the period leading up to and following *Ex parte Young* the federal injunction suit became the classical method for testing the constitutionality of state statutes.⁸ The injunctive remedy was strong medicine, and the Three-Judge Court Act did not eliminate the defects in and the widespread hostility to the injunction procedure. The procedure was unsatisfactory for both private plaintiffs and state defendants: a plaintiff had the burden of proving the traditional equity requirements for an injunction; and if the plaintiff prevailed in court, an injunction issued against the defendant state official, paralyzing enforcement of the state statute pending further review. Consequently, in 1934, without expanding or reducing the subject matter jurisdiction of the federal courts, or in any way diminishing the continuing vitality of *Ex parte Young* with respect to federal injunctions, Congress empowered the federal courts to grant a new remedy, the declaratory judgment. See Act of June 14, 1934, c. 512, 48 Stat. 955, 28 U. S. C. § 2201.

The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. The House Committee Report stated, "The principle involved in this form of procedure is to confer upon the courts the power to exercise in some in-

danger of state court hostility to the federal claim is greatest in such suits. Jurisdiction of the federal courts to hear such cases has been established at least since *Ex parte Young*, and it has been rightly observed by a distinguished judge that 'the authority and finality of *Ex parte Young* can hardly be overestimated.' Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795, 799 n. 9 (1934)." A. L. I., *Study of the Division of Jurisdiction Between State and Federal Courts* 282 (citation omitted) (1969).

⁸ After Congress accepted the basic principles of *Ex parte Young*, this Court promulgated new Rules of Practice for federal equity, which removed many of the objections to equity procedure. See 226 U. S. 627 (1912), and in particular Rule 73, 226 U. S., at 670.

stances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts." H. R. Rep. No. 1264, 73d Cong., 2d Sess. 2 (1934). Of particular significance on the question before us, the Senate report makes it even clearer that the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate:

"The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice. . . . It has been employed in State courts . . . for the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction.

"The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co. v. City of Elgin* (284 Ill. 389, 120 N. E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor v.*

Buckner (156 Tenn. 278, 300 S. W. 565, 1927), where a declaratory judgment under such circumstances was issued and settled the controversy. . . .

"The fact is that the declaratory judgment has often proved so necessary that it has been employed under other names for years, and that in many cases the injunction procedure is abused in order to render what is in effect a declaratory judgment. For example, in the case of *Pierce v. Society of Sisters* (268 U. S. 510, 525, 45 Sup. Ct. 571, 1925), the court issued an injunction against the enforcement of an Oregon statute which was not to come into force until 2 years later; in rendering a judgment declaring the statute void, the court in effect issued a declaratory judgment by what was, in effect, apparently, an abuse of the injunction. See also *Village of Euclid v. Ambler Realty Co.* (272 U. S. 365, 47 Sup. Ct. 114, 1926). Much of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments.

"Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace v. Thompson* (263 U. S. 197, 216, 44 Sup. Ct. 15, 1923), by Butler, J., when it said:

"They are not obliged to take the risk of prosecutions, fines, and imprisonment and loss of property in order to secure an adjudication of their rights."

S. Rep. No. 1005, 73d Cong., 2d Sess. 2-3, 6 (1934).

Both before and after the enactment of the Federal Declaratory Judgment Act, the practice of those States which provided a declaratory remedy was to make it available

to test the validity of criminal legislation. See E. Borchard, *Declaratory Judgments* 1024 (2d ed. 1941). Professor Borchard, a leading proponent of the Act, testified: "Most courts are unwilling to grant injunctions . . . on the ground that it is a criminal statute, but you can get a declaratory judgment in States that have it." Hearings on H. R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 19 (1928). He testified further that "when Federal courts do get power to render declaratory judgments, instead of rendering an injunction, as is now done, that requires three judges, plaintiff will get a declaratory judgment. You would not be able to get an injunction, in such cases, from one judge, but you could get a declaratory judgment as to your rights." *Id.*, at 39. Indeed, early in the history of the Act this Court applied it to test the constitutionality of a federal statute carrying criminal sanctions. See *Currin v. Wallace*, 306 U. S. 1 (1939). Professor Borchard also introduced a written statement in the hearings, which stated in part:

"[T]he declaratory judgment serves another useful purpose. It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to forego, in the fear of prosecution, the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged

statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality." Hearings on H. R. 5623, *supra*, at 75-76.

The legislative history of the Federal Declaratory Judgment Act is overwhelming that declaratory judgments were to be fully available to test the constitutionality of state and federal criminal statutes. Much of the hostility to federal injunctions referred to in the Senate report was hostility to their use against state officials seeking to enforce state regulatory statutes carrying criminal sanctions; this was the strong feeling that produced the Three-Judge Court Act in 1910, the Johnson Act of 1934, 28 U. S. C. § 1342, and the Tax Injunction Act of 1937, 28 U. S. C. § 1341. The Federal Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials, except where there was a federal policy against federal adjudication of the class of litigation altogether. See discussion, *infra*, at — — —, of *Great Lakes Co. v. Hoffman*, 319 U. S. 293 (1943). Moreover, the Senate report's clear implication that declaratory relief would have been appropriate in *Pierce* and *Ambler*, both cases involving federal adjudication of the constitutionality of a state statute carrying criminal penalties, and the report's quotation from *Terrace v. Thompson*, which also involved anticipatory federal adjudication of the constitutionality of a state criminal statute, make it plain that Congress anticipated that the declaratory judgment procedure would be used by the federal courts to test the constitutionality of state criminal statutes.

This history compels rejection of the Court's suggestion, *ante*, at 4 n. 2, that although no informations were pending at the time of the hearing, declaratory relief was inappropriate in the absence of a showing "that appellees

would suffer irreparable injury of the kind necessary to justify federal injunctive interference with the state criminal processes." Congress expressly rejected that limitation and to engraft it upon the availability of the congressionally provided declaratory remedy is simply judicial defiance of the congressional mandate. It is nothing short of judicial repeal of the statute. If the statute is to be repealed or rewritten, Congress, not this Court, must do it.

Ex parte Young makes clear that the most significant factor determining the propriety of federal intervention is whether a state proceeding exists that was initiated *before* the federal suit was filed. The Court there upheld a federal court's injunction against future state proceedings where the injunction was in aid of the federal court's jurisdiction, but the Court expressly excepted from its holding the case where a state proceeding exists which was pending at the time federal jurisdiction attached. Specifically, the Court stated, "But the Federal Court cannot, of course, interfere in a case where proceedings were already pending in a state court." 209 U. S., at 162. The Court cited *Harkrader v. Wadley*, 172 U. S. 148 (1898), in support, thus making clear that the ruling was influenced by the statutory provision, first enacted in 1793, prohibiting federal injunctions against proceedings pending in any court of a State. The history of that provision, now 28 U. S. C. § 2283, was recently traced in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970). However, the statutory bar applies only to prosecutions begun *before* the federal suit is filed and does not preclude injunctions against the institution of *future* prosecutions. See generally Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 366-378 (1930). Thus, the general rules that follow from *Ex parte Young* are, first, that where there is no pending state proceeding when the

federal suit is filed, a federal court can adjudicate constitutional claims against state officials and issue such orders as are necessary to preserve its jurisdiction; and, second, that where a state proceeding exists that was pending at the time suit was filed in federal court the federal court should ordinarily decline to render either declaratory or injunctive relief.⁹

These rules were developed further in the light of additional considerations in *Dombrowski v. Pfister*, 380 U. S. 479 (1965). *Dombrowski* confirmed the well-established principle that constitutional defenses to a state criminal charge must be initially tested in state rather than in federal courts. See *Douglas v. City of Jeannette*, 319 U. S. 157 (1943); *Cameron v. Johnson*, 390 U. S. 611, 618 (1968); compare *Stefanelli v. Minard*, 342 U. S. 117 (1951), with *Rea v. United States*, 350 U. S. 214 (1956). However, *Dombrowski* also recognized that exceptional circumstances may justify federal intervention when the opportunity to raise constitutional defenses at the state criminal trial does not assure protection of the constitutional rights at stake. *Dombrowski* considered two situations in which "exceptional circumstances" can exist. First, if in order to discourage conduct protected by the First Amendment or by some other provision of the Constitution,¹⁰ a State brings or threatens to

⁹ I put to one side the question not presented in *Ex parte Young*, or in this case, whether federal court relief would be proper when a state prosecution pending at the time of the federal hearing was begun after the federal suit was filed.

¹⁰ Declaratory relief should be available, whether the conduct inhibited is expressive or other conduct alleged to be protected by the Constitution. Of course the special sensitivity and importance of First Amendment rights (their sensitivity to "chilling") is a necessary consideration in evaluating the claim of inhibition. The deterrence emanating from the existence of a statute purporting to prohibit constitutionally protected expression is itself plainly inconsistent with the First Amendment, *Zwickler v. Koota*, 389 U. S. 241,

bring a criminal prosecution in bad faith for the purpose of harassment, the bringing of the prosecution or the threat is itself a constitutional deprivation since it subjects a person to a burden of criminal defense which he should not have to bear, and there then exists a situation "in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights."¹¹ *Dombrowski v. Pfister*, *supra*, at 485; see *Cameron v. Johnson*, *supra*, at 621; cf. *Achtenberg v. Mississippi*, 393 F. 2d 468, 474-475 (CA5 1968). Accordingly, in this context a civil suit is an appropriate means to cut short the unconstitutional state prosecution. The civil suit for remedial relief may appropriately be brought in federal court since the federal courts are the primary guardians of constitutional rights. *Zwickler v. Koota*, *supra*. Second, where a criminal statute prohibits or seems to prohibit constitutionally protected conduct, and to that extent is unconstitutionally vague or overbroad (a contention not made as to the state statute in this case), the opportunity to raise constitutional defenses at a criminal trial is inadequate to protect the underlying constitutional rights, since in that

252 (1967); *Baggett v. Bullitt*, 377 U. S. 360 (1964), which was intended to protect vigorous, robust, and unpopular speech without a threat of punishment under state law. See, e. g., *Whitney v. California*, 274 U. S. 357, 375-376 (1927) (Brandeis, J., concurring); *Stromberg v. California*, 283 U. S. 359, 369 (1931); *Roth v. United States*, 354 U. S. 476, 484 (1957); *NAACP v. Button*, 371 U. S. 415, 429 (1963); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

¹¹ Bad faith harassment can, of course, take many forms, including arrests and prosecutions under valid statutes where there is no reasonable hope of obtaining a conviction, see, e. g., *Cameron v. Johnson*, *supra*, at 621, and a pattern of discriminatory enforcement designed to inhibit the exercise of federal rights, see, e. g., *Bailey v. Patterson*, 323 F. 2d 201 (CA5 1963). Cf. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1372 (7), at pp. 308-310 (1969).

situation a substantial number of people may well avoid the risk of criminal prosecution by abstaining from conduct thought to be proscribed by the statute. Even persons confident that their contemplated conduct would be held to be constitutionally protected and that accordingly any state conviction would be overturned may be deterred from engaging in such conduct by the prospect of becoming enmeshed in protracted criminal litigation, and by the risk that in the end, years later, their confidence will prove to have been misplaced and their resources wasted. This deterrence is magnified by the scope that vagueness or overbreadth gives for discriminatory or capricious enforcement. Federal anticipatory relief is justified here because it is a principal function of the federal courts to vindicate the constitutional rights of all persons—those who want to obey state laws as well as those prepared to defy them.¹² Thus in *Dombrowski* he held that in cases in these categories federal courts may properly intervene in order to assure the full protection of federal constitutional rights.¹³

¹² The federal declaratory judgment is not a prize to the winner of a race to the courthouses, but rather a declaration of rights that obviates the need to risk a state criminal proceeding or a race to the courthouses. Within the limits of Article III, see *Golden v. Zwickler*, 394 U. S. 103 (1969), doctrines of ripeness should be so fashioned as to give adequate room for this kind of relief.

¹³ 28 U. S. C. § 1343 is an independent basis of a federal jurisdiction where the plaintiff seeks vindication of constitutional rights; and, where this provision is invoked together with 42 U. S. C. § 1983, exhaustion of state remedies is not required. *McNeese v. Board of Education*, 373 U. S. 668 (1963). Federal court abstention is particularly inappropriate in cases brought under the statutes designed specifically to authorize federal protection of civil rights. As Professor Wechsler has stated, "There Congress declared the historic judgment that within this precious area . . . there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the

Taken together, the principles of *Ex parte Young* and *Dombrowski* establish that whether a particular case is appropriate for federal intervention depends both on whether a state proceeding is pending and on the ground asserted for intervention. Where the ground is bad faith harassment, intervention is justified whether or not a state prosecution is pending. Intervention in such cases does not interfere with the normal good faith enforcement of state criminal law by constitutional means, and does not necessarily require a decision on the constitutionality of a state statute. It simply prevents particular unconstitutional use of the State's criminal law in bad faith against the federal plaintiff. Under *Douglas v. City of Jeannette*, *supra*, at 164, a person has no immunity from a state prosecution "brought lawfully and in good faith," but he is entitled to federal relief from a state prosecution which amounts to bad faith harassment.¹⁴

The situation is different where the plaintiff seeks federal intervention on the ground that a state statute is unconstitutional, but does not allege facts showing bad faith harassment. In cases of this sort, on whatever provision the claim of unconstitutionality rests, the justification for intervention is that individuals should be able to exercise their constitutional rights without running the risk of becoming lawbreakers. This justification applies with full force where there is a continuing live controversy and federal intervention is sought when there is no state prosecution in which the statute may be tested. However, where federal intervention is sought after a

state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern." Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Prob.* 216, 230 (1948).

¹⁴ Whether in this context 28 U. S. C. § 2283 bars injunctive relief I need not consider since there is no injunction here.

state prosecution has commenced and while it is pending, the interests protected by federal intervention must be weighed against the broad countervailing principles of federalism. The pending state proceeding ordinarily provides an existent, concrete opportunity to secure vindication of constitutional claims in the state courts, with ultimate review by this Court. In this situation collateral resort to a federal court will not speed up the resolution of the controversy since that will not come to an end in any event until the state litigation is concluded. Moreover, federal intervention may disrupt the state proceeding through the issuance of necessary stays or the burdensome necessity for the parties to proceed in two courts simultaneously. Federal adjudication of the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the State's own adjudicative process. For these reasons, federal courts should not ordinarily intervene by way of either declaratory or injunctive relief in cases where a state court prosecution exists which began before the federal suit was filed, and the federal court plaintiff alleges only that the state statute being applied to him is unconstitutional. Cf. *Brillhart v. Excess Ins. Co.*, 316 U. S. 491, 494-495 (1942); Wright, *supra*, at 205. The interests served by federal intervention in that context are plainly outweighed by the principles of comity essential to our federal system.

When no state proceeding is pending and federal intervention is therefore appropriate,¹⁵ the federal court must decide which of the requested forms of relief should be granted. Ordinarily a declaratory judgment will be appropriate if the case-or-controversy requirements of Article III are met, if the narrow special factors, war-

¹⁵ I do not consider here the types of relief available in cases of bad faith harassment discussed *supra*, at n. 11.

ranting federal abstention are absent, and if the declaration will serve a useful purpose in resolving the dispute. See generally *Zwickler v. Koota*, *supra*; *Golden v. Zwickler*, *supra*. This general rule carries out the unambiguous intention of Congress expressed in the Federal Declaratory Judgment Act and reflected in the committee reports, *supra*. The propriety of an injunction should be considered separately and in light of the traditional requirements of equity jurisprudence as applied to the protection of constitutional rights. See, *e. g.*, *Douglas v. City of Jeannette*, *supra*; *Ex parte Young*, *supra*; *Dombrowski v. Pfister*, *supra*; *Cameron v. Johnson*, *supra*; *Zwickler v. Koota*, *supra*; see also H. Hart & H. Wechsler, *supra*, at 862-864.

It follows that the Court's statement today in *Samuels v. Mackell*, that in cases where the state criminal prosecution is pending, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration . . . in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible, declaratory relief should ordinarily be denied as well . . ." is not applicable when determining whether to issue a declaratory judgment in a case where no state criminal prosecution is pending. Its applicability is precluded by the nature of the remedy created by the Federal Declaratory Judgment Act, and by our decisions under the Act, culminating in *Zwickler v. Koota*, *supra*, which establish that the considerations governing the grant of a declaratory judgment are quite different from those governing the grant of an injunction, even though both forms of relief are discretionary and thus, in the broad sense of the term, "equitable" in nature. The application of the *Mackell* statement when no criminal prosecution is pending would run counter to our decision this Term in *Wisconsin v. Constantineau*, — U. S. —, decided January 19, 1971, where we flatly rejected the

proposition that federal courts should stay their hand until the state courts have been asked to pass on a statute clearly unconstitutional on its face. We there said:

"Congress could of course have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of the state court judgments. But our First Congress [in the First Judiciary Act, 1 Stat. 73] resolved differently and created the federal court system and in time granted the federal courts various heads of jurisdiction, which today involve most federal constitutional rights. . . .

"We would negate the history of the jurisdiction of the federal district courts if we held the federal court should stay its hand and not decide the question before the state courts decided it." — U. S., at —.

Moreover, the prerequisites for injunctive and declaratory relief are different. The availability of an alternative adequate legal remedy ordinarily bars an injunction, but does not bar declaratory relief, see Fed. R. Civ. P. 57, unless the alternative remedy was expressly created by statute. See *Katzenbach v. McClung*, 379 U. S. 294, 295-296 (1964). Similarly, irreparable injury must be shown in a suit for an injunction, but not in an action for declaratory relief. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241 (1937). Of course, neither remedy may be afforded in the absence of a live controversy. *United States v. Alaska S. S. Co.*, 253 U. S. 113 (1920); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *Zwickler v. Koota*, *supra*, at 244 n. 3. However, the existence of an actual controversy and the adequacy of declaratory relief to resolve it are issues often presenting particular difficulty in declaratory judgment actions, and it is to these

issues that judicial discretion in such actions is primarily directed. See *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U. S. 237 (1952).

The effects of injunctive and declaratory relief in their impact on the administration of a State's criminal laws are very different. See generally *Kennedy v. Mendoza-Martinez*, 372 U. S., at 152-155. An injunction barring enforcement of a criminal statute against particular conduct immunizes that conduct from prosecution under the statute. A broad injunction against all enforcement of a statute paralyzes the State's enforcement machinery: the statute is rendered a nullity. A declaratory judgment, on the other hand, is merely a declaration of legal status and rights; it neither mandates nor prohibits state action. See *Flemming v. Nestor*, 363 U. S. 603, 607 (1960); Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 15-16 (1964).

Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear. A state statute may be declared unconstitutional *in toto*—that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad—that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly construed by the state courts it will not be incapable of

constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would. Thus, where the highest court of a State has had an opportunity to give a statute regulating expression a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may well be open to a state prosecutor, after the federal court decision, to bring a prosecution under the statute if he reasonably believes that the defendant's conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction. Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew. Finally, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system.¹⁶ What is clear, however, is that even though a declaratory judgment has "the force and effect of a final judgment," 28 U. S. C. § 2201, it is a much milder form of relief than an injunction. Though

¹⁶ The Senate Report noted that "The declaratory judgment is a final, binding judgment between adversary parties and conclusively determines their rights." S. Rep. No. 1005, 73d Cong., 2d Sess., 5 (1934). But in my view the federal court's duty to render a declaratory judgment is not the less whatever may be its *res judicata* effect as between the parties to the litigation.

it may be persuasive, it is not ultimately coercive; non-compliance with it may be inappropriate, but is not contempt.

The Court's opinion in *Zwickler v. Koota* confirmed that the considerations governing the grant of the two remedies are quite different. *Zwickler v. Koota* distinguished the prayer for injunction from the prayer for declaratory relief and held squarely that the District Court erred in denying declaratory relief on the ground that there was no "showing . . . of 'special circumstances to justify . . . ' injunctive relief." 389 U. S., at 253-254. The Court expressly held that "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court *has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.*" *Id.*, at 254 (emphasis added). See also *Malone v. Emmet*, 278 F. Supp. 193 (MD Ala. 1967).

Great Lakes Co. v. Huffman, *supra*, is not contrary to my conclusion. That case was an action by employers for a declaration that a state unemployment compensation scheme which imposed a tax upon them was unconstitutional. Congress has always treated judicial interference with the enforcement of tax laws as a subject governed by unique considerations, and this Court has consistently enforced the congressional command that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341. This Court, without relying on the particular terms of the statute, has taken its underlying policy to require that federal courts stay com-

pletely out of the field of anticipatory adjudication of tax cases so long as an adequate remedy is otherwise available. In *Huffman* "we held that declaratory relief that a state tax was unconstitutional should be denied by the federal court. The basis of our ruling was that since Congress had prohibited the federal courts from enjoining state taxes where an adequate remedy was available in the state courts declaratory relief should also be withheld." *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U. S. 237, 253 (1952) (DOUGLAS, J., dissenting) (citation omitted). Thus *Huffman* adhered to the congressional recognition of the unique considerations presented by anticipatory tax litigation. *Ibid.* As the statutes barring anticipatory relief in federal tax cases, 26 U. S. C. § 7421 (1964, Supp. V 1965-1969); 28 U. S. C. § 2201 (express exception for federal taxes), make entirely clear, the unique considerations which were the basis of *Huffman* relate not so much to considerations of federalism as to the peculiar needs of tax administration.¹⁷ Cf. Agricultural Adjustment Act § 30, 49 Stat.

¹⁷ "[T]axes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection." *Bull v. United States*, 295 U. S. 247, 259-260 (1935); see also *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146 (1896). In *Phillips v. Commissioner*, 283 U. S. 589, 595-596 (1931), Mr. Justice Brandeis said for the Court, "Where . . . adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights . . ." (citations omitted). Cf. *Matthews v. Rodgers*, 284 U. S. 521, 525-526 (1932). The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures

770, amending Act of May 12, 1933, 48 Stat. 31 (now 7 U. S. C. § 623 (a)). In contrast, there is no statutory counterpart of 28 U. S. C. § 1341 applicable to intervention in state criminal prosecutions.¹⁸

Of course the grant or denial of a declaratory judgment is a matter of sound judicial discretion. The standards

for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts. See generally S. Rep. No. 1035, 75th Cong., 1st Sess. (1937). These considerations make clear that the underlying policy of the anti-tax-injunction statute, 28 U. S. C. § 1341, relied on in *Great Lakes*, bars all anticipatory federal adjudication in this field, not merely federal injunctions. Very different considerations apply in the context of state criminal statutes challenged as unconstitutional. At issue on one side are fundamental personal rights, not property rights. At risk on the other is not the current financing of state government, but the future enforcement of a particular criminal statute.

¹⁸ 28 U. S. C. § 2283 is certainly not analogous to the prohibition of federal anticipatory relief in tax cases. That statute applies only where there is a pending state proceeding, *Dombrowski v. Pfister*, *supra*, at 484 n. 2, whereas the present discussion concerns the propriety of federal relief where no state proceeding is pending. Moreover, unlike the tax statutes, § 2283 is not directed to any particular class of litigation, criminal or otherwise, but is designed to protect the process of orderly state court adjudication generally. When Congress has wanted to protect particular categories of state business from anticipatory federal intervention, it has known how to say so. See 28 U. S. C. §§ 1341, 1342. No such statute applies

for the exercise of this discretion have been articulated in *Aetna Life Ins. Co. v. Haworth*, *supra*; *Public Service Comm'n of Utah v. Wycoff Co.*, *supra*, and in *Zwickler v. Koota*, *supra*; see — *supra*. Where a federal court is asked to declare the validity or invalidity of a state statute, this discretion is to be exercised "in the light of the relations existing under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U. S. 241, 251 (1886). However, as the Court said in *Zwickler v. Koota*:

"Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision

to state criminal law administration. Finally, the Federal Declaratory Judgment Act plainly evinces a congressional intent that the statutory term "injunction" in § 2283 not be read to include declaratory judgments. An analogous question was before us recently in *Mitchell v. Donovan*, 398 U. S. 427 (1970). There we were called on to decide whether an order of a three-judge court granting or denying a declaratory judgment may be appealed to this Court under 28 U. S. C. § 1253, which provides that with certain exceptions "any party may appeal to the Supreme Court from an order granting or denying . . . an . . . injunction in any civil action . . . required . . . to be . . . determined by a district court of three judges." (Emphasis added.) The direct appeal provision of § 1253 obviously reflects the particular sensitivity of granting or denying an injunction in those important cases required to be heard by three-judge courts. See generally Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964). The Court clearly had those considerations in mind when it observed, "While there are similarities between injunctions and declaratory judgments, there are also important differences This Court's jurisdiction under [§ 1253] is to be literally construed It would hardly be faithful to such a construction to read the statutory term 'injunction' as meaning 'declaratory judgment.'" 398 U. S., at 430.

of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '... to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,'*Robb v. Connolly*, 111 U. S. 624, 637 The judge-made doctrine of abstention, first fashioned in 1941 . . . sanctions such escape only in narrowly limited 'special circumstances.'*Propper v. Clark*, 337 U. S. 472, 492." 389 U. S., at 248.

Thus, where no criminal prosecution involving the federal court parties is pending when federal jurisdiction attaches, declaratory relief determining the disputed constitutional issue will ordinarily be appropriate to carry out the purposes of the Federal Declaratory Judgment Act and to vindicate the great protections of the Constitution.

I conclude that the three-judge court properly exercised its discretion in issuing a declaratory judgment upon the constitutionality of St. Bernard Parish Ordinance No. 21-60. I also agree with the District Court that the ordinance is unconstitutional on its face because "mortally infected with the vice of vagueness." 304 F. Supp., at 670. Appellants do not assert the contrary.

Paragraphs 1 and 2 of the judgment entered August 14, 1969, should be reversed and the judgment in all other respects should be affirmed.

APPENDIX A

§ 106. Obscenity

A. Obscenity in the intentional:

(1) Exposure of one's person in a public place in such manner that any part of a sex organ may be seen by another person, with the intent of arousing sexual desire.

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording of any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) Performance by any person or persons in the presence of another person or persons with the intent of arousing sexual desire, of any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement.

(5) Solicitation or attempt to entice any unmarried person under the age of seventeen years to commit any act prohibited by this section.

(6) Requirement by a person, as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication to a purchaser or consignee, that such purchaser or consignee receive for resale any other article, book or publication reasonably believed by such purchaser or consignee to contain articles or material of any kind or description which are designed, intended or reasonably calculated to or which do in fact appeal to the prurient interests of the average person in the community, as judged by contemporary community standards, or the denying or threatening to deny any franchise or to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles or things or by reason of the return thereof.

(7) Display of nude pictures of a man, woman, boy or girl in any public place, except as works of art exhibited in art galleries.

B. In prosecutions for obscenity, lack of knowledge of age or marital status shall not constitute a defense.

C. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both.

When a violation of Paragraphs (1), (2), (3), and (4) of Subsection (A) of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than one thousand dollars, or imprisoned for not more than five years with or without hard labor, or both.

Amended by Acts 1958, No. 388, § 1; Acts 1960, No. 199, § 1; Acts 1962, No. 87, § 1; Acts 1968, No. 647, § 1, emerg. eff. July 20, 1968, at 1:30 P.M.

POLICE JURY
ST. BERNARD PARISH
ST. BERNARD COURTHOUSE ANNEX
CHALMETTE, LOUISIANA

EXTRACT OF THE OFFICIAL PROCEEDINGS OF
THE POLICE JURY OF THE PARISH OF ST.
BERNARD, STATE OF LOUISIANA, TAKEN AT
THE REGULAR MEETING HELD IN THE
POLICE JURY ROOM OF THE COURTHOUSE
ANNEX, AT CHALMETTE, LOUISIANA, ON
NOVEMBER 2, 1960, AT ELEVEN O'CLOCK
(11:00) A. M.

On motion of Celestine Melerine, seconded by Joseph
V. Papania and upon recommendation of the District
Attorney of the Parish of St. Bernard, the following Ordinance was adopted.

ORDINANCE NO. 21-60

An Ordinance known as the Ordinance of St. Bernard Parish, relative to prohibiting and defining the offense of obscenity and indecent literature, adding thereto the offense of "attempt," and prescribing penalties for the violation thereof.

SECTION 1.

Offense of obscenity defined and prohibited.

SECTION 2.

BE IT ORDAINED, by the Police Jury of the Parish of St. Bernard that obscenity is prohibited and is hereby defined as the intentional.

SECTION 3.

BE IT FURTHER ORDAINED, that public personal exposure of the female breast or the sexual organs or fundament of any person of either sex.

SECTION 4.

BE IT FURTHER ORDAINED, that production, sale, exhibition, possession with intent to display, or distribution of any obscene, lewd, lascivious, prurient or sexually indecent print, advertisement, picture, photograph, written or printed composition, model, statute, instrument, motion picture, drawing, phonograph recording, tape or wire recording, or device or material of any kind.

SECTION 5 (a)

BE IT FURTHER ORDAINED that the performance of any dance, song, or act in any public place, or in any public manner representing or portraying or reasonably calculated to represent or portray any act of sexual intercourse between male and female persons, or any act of perverse sexual intercourse or contact, or unnatural carnal copulation, between persons of any sex, or between persons and animals.

SECTION 5 (b)

OR FURTHER, the performance in any public place, or any public manner of any obscene, lewd, lustful, lascivious, prurient or sexually indecent dance, or the rendition of any obscene, lewd, lustful, lascivious, prurient or sexually indecent song or recitation.

SECTION 6.

BE IT FURTHER ORDAINED, PRODUCTION, POSSESSION WITH INTENT to display, exhibition, distribution or sale of any literature as defined herein

containing one or more pictures of nude or semi-nude female persons, wherein the female breast or any sexual organ is shown or exhibited, and where, because of the number or manner of portrayal in which such pictures are displayed in such literature, they are designed to appeal predominantly to the prurient interest.

SECTION 7.

BE IT FURTHER ORDAINED, that it shall also be unlawful for any person to attempt to commit any of the violations set forth in this section.

SECTION 8.

BE IT FURTHER ORDAINED, that any person upon conviction of a violation of this section shall be sentenced to serve not more than ninety (90) days, or pay a fine of not more than one hundred dollars (\$100.00) or both, in the discretion of the Court.

BE IT FURTHER ORDAINED, that persons convicted of an attempt to violate this section shall be sentenced to not more than one-half of the maximum penalty prescribed, or pay not more than half of the maximum fine or both, as set forth above.

SECTION 9.

BE IT FURTHER ORDAINED, that the word literature as used herein means and includes a book, booklet, pamphlet, leaflet, brochure, circular, folder, handbill or magazine. The word picture as used herein means and includes any photograph, lithograph, drawing, sketch, abstract, poster, painting, figure, image, silhouette, representation or facsimile.

SECTION 10.

BE IT FURTHER ORDAINED, that this Ordinance shall be published in the Official Journal of the Parish, the St. Bernard Voice.

This Ordinance having been submitted to a vote, the vote thereon was as follows:

YEAS: Henry C. Schindler, Jr., Joseph V. Papania, Peter N. Huff, Peter Perniciaro, Louis P. Munster, John W. Booth, Sr., Claude S. Mumphrey, Celestine Melerine, Edward L. Jeanfreau, and Mrs. Blanche Molero.

NAYS: None.

ABSENT: None.

And the Ordinance was declared adopted on this, the 2nd day of November, 1960.

(S.) VALENTINE RIESS,
(Valentine Riess),
President.

(S.) JOSEPH E. SORCI,
(Joseph E. Sorci),
Secretary.

CERTIFICATE

I CERTIFY THAT the above and foregoing is a true and correct copy of an ordinance adopted by the St. Bernard Parish Police Jury at a Regular meeting held at Chalmette, Louisiana, in the Police Jury Room at the Courthouse Annex on the 2nd day of November, 1960.

Witness my hand and the Seal of the St. Bernard Parish Police Jury this 11th day of February, 1969.

R. M. McDOUGALL,
(R. M. McDougall).